CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 29 OCTOBER 11, 1995 NO. 41

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

Treasury Decisions

19 CFR Part 134

(T.D. 95–79)

TECHNICAL CORRECTION OF J LIST

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to correct the description set forth in section 134.33, the "J List", of rails, joint bars and tie plates as articles excepted from country of origin marking requirements pursuant to 19 U.S.C. 1304(a)(3)(J). The description of rails, joint bars and tie plates now does not accurately reflect the correct tariff subheadings of the Harmonized Tariff Schedule of the United States (HTSUS) of articles covered within the marking exception. The error in the description is due to the inadvertent omission of certain subheading numbers when the Customs Regulations were amended to implement the Harmonized System of tariff classification by converting references to the Tariff Schedules of the United States to references to the HTSUS.

EFFECTIVE DATE: This amendment is effective September 27, 1995.

FOR FURTHER INFORMATION CONTACT: Keith Rudich, Special Classification and Marking Branch, (202) 482–6980.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 134.33, Customs Regulations (19 CFR 134.33) sets forth a list of articles, including certain of the applicable tariff provisions, which are excepted from the requirements of country of origin marking pursuant to 19 U.S.C. 1304(a)(3)(J). When this "J List" was amended by T.D. 89–1 dated December 21, 1988 (53 FR 51256) to change the referenced tariff provisions from the Tariff Schedules of the United States (TSUS) to the Harmonized Tariff Schedule of the United States (HTSUS), certain tariff classifications were inadvertently omitted from the reference in the "J List" to "Rail, joint bars and tie plates". This document corrects those omissions by amending section 134.33 of the Customs Regu-

lations (19 CFR § 134.33) to clarify that the reference to "Rails, joint bars and tie plates" encompasses subheadings 7302.10.10 through 7302.90.00, HTSUS.

REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

Because no notice of proposed rulemaking is required for this rule, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)* do not apply.

This document does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

INAPPLICABILITY OF PUBLIC NOTICE AND COMMENT REQUIREMENTS AND DELAYED EFFECTIVE DATE REQUIREMENTS

Because this document merely corrects an error from a previously published document, it has been determined, pursuant to 5 U.S.C. 553(b)(B), that the notice and public comment procedures thereon are unnecessary. For the same reasons, it has also been determined, pursuant to 5 U.S.C. 553(d)(3), that good cause exists for not requiring a delayed effective date.

DRAFTING INFORMATION

The principal author of this document was Janet L. Johnson, Regulations Branch. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 134

Customs duties and inspection, Labeling, Packaging and containers.

AMENDMENT TO THE REGULATIONS

For the reasons set forth in the preamble, part 134 of the Customs Regulations (19 CFR 134) is amended as set forth below.

PART 134—COUNTRY OF ORIGIN MARKING

1. The general authority citation for part 134 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States (HTSUS)), 1304, 1624.

2. In § 134.33, the entry in the "Articles" column stating "Rails, joint bars, and tie plates covered by subheadings 7302.90.00, Harmonized Tariff Schedule of the United States" is removed and the entry "Rails, joint bars, and tie plates covered by subheadings 7302.10.10 through 7302.90.00, Harmonized Tariff Schedule of the United States" is added in its place.

GEORGE J. WEISE,
Commissioner of Customs.

Approved: September 6, 1995.

DENNIS M. O'CONNELL,
Acting Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, September 27, 1995 (60 FR 49752)]

U.S. Customs Service

General Notices

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 9–1995)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of August 1995 follow. The last notice was published in the CUSTOMS BULLETIN on September 6, 1995.

Corrections or information to update files may be sent to:

U.S. Customs Service
IPR Branch
1301 Constitution Avenue NW (Franklin Court)
Washington, DC 20229

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, (202) 482–6960.

Dated: September 22, 1995.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

The list of recordations follow:

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, THM OR MSK	OWNER NAME	RES
COP9500146	19950822	20150822	KELLY DOLL	MATTEL INC.	N
COP9500147	19950823	20150823	SOUTHWEST BOLO AND BRACELET	O.T.T. SILVER MANUFACTURERS INC.	N
COP9500148	19950824	20150824	INFINITY LIGHT BULBS	INFINITY INTERNATIONAL MARKETING	N
COP9500149	19950825	20150825	NINJA WARRIOR	MASTER TOYS & NOVELTIES	N
COP9500150	19950825	20150825	MAGIC ANGEL	MASTER TOYS & NOVELTIES	N
COP9500151	19950825	20150825	MAGIC ANGEL MASK	MASTER TOYS & NOVELTIES	N
COP9500152	19950825	20150825	PALOMA'S HUGS & KISSES PIN	ANNE PALOMA RUIZ-PICASSO	N
COP9500153	19950825	20150825	PALOMA'S KISS EARRINGS	ANNE PALOMA RUIZ-PICASSO	N
COP9500154	19950825	20150825	PALOMA'S SCRIBBLE PIN	ANNE PALOMA RUIZ-PICASSO	N
COP9500155	19950825	20150825	GUARDIAN ANGEL (G8973)	EUROPA WHOLESALES LTD.	N
COP9500156	19950825	20150825	PEARL RIVER BRIDGE BRAND LABELS	GUANGDONG INTERNATIONA LTD.	N
COP9500157	19950825	20150825	SNAKELIGHTT SINGLE COIL*AROUND LADDER	BLACK & DECKER, INC.	N
COP9500158	19950829	20150829	FESTIVE LIGHTS	BARCANA INC.	N
COP9500159	19950830	20150831	SIRIPE AND PLAID COLLECTION 5FS2030, 5FS2026, 5FS2031	SUPREME INTERNATIONAL	N
COP9500160	19950830	20150830	SIRIPE AND PLAID COLLECTION	SUPREME INTERNATIONAL CORP.	N
SUBTOTAL RECORDATION TYPE		15			
TMK9500418	19950822	20000731	DAIICHI	ANGLER SPORT GROUP INC.	Y
TMK9500419	19950822	20041212	RUFINA FISH SAUCE AND DESIGN	RUFINA AND COMPANY	N
TMK9500420	19950822	20050611	DUNHILL	DUNHILL TOBACCO OF LONDON LTD.	N
TMK9500421	19950823	20040515	BABY LUV AND DESIGN	BEND'N STRETCH INC.	Y
TMK9500422	19950823	20030209	RASOLLI	RASOLLI FOOTWEAR CORPORATION	Y
TMK9500423	19950823	20050328	LUCKY YOU AND DESIGN	LUCKY BRAND DUNGAREES INC.	N
TMK9500424	19950823	20060603	WOMEN & CHILD ON BOAT AND DESIGN	LEE KUM COMPANY LIMITED	N
TMK9500425	19950823	20060603	WOMEN DESIGN	LEE KUM COMPANY LIMITED	N
TMK9500426	19950823	20020811	PANDA BRAND	LEE KUM COMPANY LIMITED	N
TMK9500427	19950823	20060401	PANDA BRAND	LEE KUM COMPANY LIMITED	N
TMK9500428	19950823	20010101	DEERING	DEERING PRECISION INSTRUMENTS	N
TMK9500429	19950823	20000122	GUARD AND DESIGN	DOMESTIC BROOM AND BRUSH CO.	N
TMK9500430	19950823	19980620	LION	DOMESTIC BROOM AND BRUSH CO.	N
TMK9500431	19950823	20050502	BODY ADVENTURE	KNOWLEDGE ADVENTURE INC.	N
TMK9500432	19950823	19980926	COURREGES	COURREGES DESIGN	N
TMK9500433	19950823	20061115	COURREGES	COURREGES DESIGN	N
TMK9500434	19950825	20050216	CANADIAN CLUB	HIRAM WALKER & SONS INC.	N
TMK9500435	19950825	20050314	MTR AND DESIGN	MTR IMPORTS INC.	N
TMK9500436	19950825	20050613	E-SCAPE	INTELLECTUAL PROPERTY CONSULTANT	N
TMK9500437	19950825	20050715	KENT AND DESIGN	BROWN & BIGELOW INC.	N
TMK9500438	19950829	20050315	STYLIZED CROWN AND M G DESIGN	HIBBERT COMPANY	Y
TMK9500439	19950829	20090808	MOSSIMO	MOSSIMO INC.	Y
TMK9500440	19950829	20001020	MOSSIMO M AND DESIGN	MOSSIMO INC.	Y
TMK9500441	19950829	20030112	MOSSIMO	MOSSIMO INC.	Y
TMK9500442	19950829	20030608	MOSSIMO AND M DESIGN	MOSSIMO INC.	Y
TMK9500443	19950829	20031228	MOSSIMO AND BADGE DESIGN	MOSSIMO INC.	Y
TMK9500444	19950829	20050425	MICELLANEOUS DESIGN	MONTBLANC-SIMPLO GMBH.	N
TMK9500445	19950829	20061014	10WR	PETERSEN MANUFACTURING CO., INC.	N
TMK9500446	19950829	20060902	7WRR	PETERSEN MANUFACTURING CO., INC.	N
TMK9500447	19950829	20061014	5WR	PETERSEN MANUFACTURING CO., INC.	N
TMK9500448	19950829	20000102	MAGGI	SOCIETE DES PRODUITS NESTLE S.A.	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK9500449	19950829	20010115	MAGGI AND DESIGN	SOCIETE DES PRODUITS NESTLE S.A.	N
TMK9500450	19950829	20050902	RHEABAN	PFIZER INC.	N
TMK9500451	19950829	20030720	EMBASSY	GRUEN PRECISION INC.	N
TMK9500452	19950829	20050530	CIM	C.I.M. INDUSTRIES INC.	N
TMK9500453	19950829	20020529	POLACOLOR	POLAROID CORPORATION	N
TMK9500454	19950829	20021012	NEWCOR	JMP-NEWCOR INNTERNATIONAL INC.	N
TMK9500455	19950829	20010526	MARDI GRAS	JMP-NEWCOR INNTERNATIONAL INC.	N
TMK9500456	19950829	20050328	GILDA	GILDA MARX INCORPORATED	Y
TMK9500457	19950829	20050418	BLUE RIBBON CHAMPIONS	MARCHON INC.	N

SUBTOTAL RECORDATION TYPE 40

TOTAL RECORDATIONS ADDED THIS MONTH 55

GEOGRAPHIC BOUNDARIES OF CUSTOMS BROKERAGE, CARTAGE, AND LIGHTERAGE DISTRICTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This document informs the public of the geographic areas covered for purposes of Customs broker permits and for certain cartage and lighterage purposes where the word "district" appears in the Customs Regulations.

EFFECTIVE DATE: September 30, 1995 at 11:59 p.m. EST.

FOR FURTHER INFORMATION CONTACT: Jerry Laderberg, Office of Field Operations (202) 927–0415.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In Treasury Decisions 95–77 and 95–78, both published in this issue of the Federal Register, Customs amended its regulations to reflect its new organizational structure. Concerning this reorganization, Customs stated that, although the concepts of districts and regions would, for the most part, be eliminated, they would still exist for certain limited purposes concerning broker permits and cartage and lighterage licensing. Accordingly, in § 111.1, definitions of "district" and "district director" were added to enable the current statutory Customs broker licensing and permit schemes to operate, and in § 112.1, a definition of "district" was added for certain purposes regarding the cartage and lighterage of merchandise by parties excepted from obtaining a license to do so. Both of these sections provided that Customs would publish a listing of each district, and the ports thereunder, on or before October 1, 1995, and whenever updated. This document constitutes the referenced publication.

In the table below, arranged alphabetically by State or other geographic location, each of the service ports listed in the left column represents a "district" for purposes of §§ 111.1 and 112.1, and the ports of entry listed to the right of each service port represent the ports within that "district."

Service ports	Ports of entry
Alabama	
Mobile	Birmingham Gulfport, MS Huntsville Mobile Pascagoula, MS

Service ports	Ports of entry
Alaska	
Anchorage	Alcan Anchorage Dalton Cache Fairbanks Juneau Ketchikan Sitka Skagway Valdez Wrangell
Arizona	
Nogales	Douglas Lukeville Naco Nogales Phoenix San Luis Sasabe Tucson
California	
Los Angeles	Los Angeles-Long Beach LAX Las Vegas, NV Port Hueneme Port San Luis
San Diego	Andrade Calexico Tecate
San Francisco	Eureka Fresno Reno, NV San Francisco-Oakland
District of Columbia	
Dulles	Alexandria, VA Dulles, VA
Florida	
Miami	Key West Miami Port Everglades West Palm Beach
Tampa	Boca Grande Fernandina Beach Jacksonville Orlando Panama City Pensacola Port Canaveral Port Manatee St. Petersburg Tampa
Georgia	
Savannah	Atlanta Brunswick Savannah

Service ports	Ports of entry
Hawaii	
Honolulu	Hilo
	Honolulu
	Kahului
	Nawilliwili-Port Allen
Illinois	
Chicago	Chicago
	Davenport, IA-Moline and Rock Island
	Des Moines, IA
	Omaha NE
	Peoria
	Rockford
Louisiana	
New Orleans	Baton Rouge
	Chattanooga, TN
	Gramercy
	Greenville, MS
	Knoxville, TN
	Lake Charles
	Little Rock-North Little Rock, AR
	Memphis, TN
	Morgan City
	Nashville, TN
	New Orleans
	Shreveport-Bossier City
	Vicksburg, MS
Maine	
Portland	Bangor
	Bar Harbor
	Bath
	Belfast
	Bridgewater
	Calais
	Eastport
	Fort Fairfield
	Fort Kent
	Houlton
	Jackman
	Jonesport
	Limestone
	Madawaska
	Portland
	Portsmouth, NH
	Rockland
	Van Buren
	Vanceboro
Maryland	
Baltimore	Annapolis
	Baltimore
	Cambridge

Service ports	Ports of entry
Massachusetts	
Boston	Boston
	Bridgeport, CT
	Fall River
	Gloucester
	Hartford, CT
	Lawrence
	New Bedford
	New Haven, CT
	New London, CT
	Plymouth
	Salem
	Springfield
	Worcester
Michigan	
Detroit	Battle Creek
	Detroit
	Grand Rapids
	Muskegon
	Port Huron
	Saginaw-Bay City-Flint
	Sault Ste. Marie
Minnesota	
Duluth	Ashland, WI
	Duluth and Superior, WI
	Grand Portage
	International Falls-Ranier
Minneapolis	Minneapolis-St. Paul
Missouri	
St. Louis	Kansas City
	Springfield
	St. Joseph
	St. Louis
	Wichita, KS
Montana	
Great Falls	Butte
	Del Bonita
	Denver, CO
	Eastport, ID
	Great Falls
	Morgan
	Opheim
	Piegan
	Porthill, ID
	Raymond
	Roosville
	Salt Lake City, UT
	Scobey
	Sweetgrass
	Turner
	Whitetail
	Whitlash

Service ports	Ports of entry
New York	
Buffalo	Buffalo-Niagara Falls
	Oswego
	Rochester
	Sodus Point
	Syracuse
	Utica
Champlain	Alexandria Bay
	Cape Vincent
	Champlain-Rouses Point
	Clayton
	Massena
	Ogdensburg
	Trout River
JFK/New York/Newark	Albany
	New York/Newark, NJ
	JFK
	Perth Amboy, NJ
North Carolina	
Charlotte	Beaufort-Morehead City
	Charlotte
	Durham
	Reidsville
	Wilmington
	Winston-Salem
North Dakota	
Pembina	Ambrose
	Antler
	Baudette, MN
	Carbury
	Dunseith
	Fortuna
	Hannah
	Hansboro
	Maida
	Neche
	Noonan
	Northgate
	Noyes, MN
	Pembina
	Pinecreek, MN
	Portal
	Roseau, MN
	Sarles
	Sherwood
	St. John
	Walhalla
	Warroad, MN
	Westhope

Service ports	Ports of entry
Ohio	
Cleveland	Ashtabula/Conneaut Cincinnati-Lawrenceburg, IN Cleveland Columbus Dayton Erie, PA Indianapolis, IN Louisville, KY Owensboro, KY-Evansville, IN Toledo-Sandusky
Oregon	
Portland	Astoria Boise, ID Coos Bay Longview Newport Portland
Pennsylvania	
Philadelphia	Harrisburg Lehigh Valley Philadelphia-Chester, PA and Wilmington, DE Pittsburgh Wilkes-Barre/Scranton
Puerto Rico	
San Juan	Aquadilla Fajardo Guanica Humacao Jobos Mayaguez Ponce San Juan
Rhode Island	
Providence	Newport Providence
South Carolina	
Charleston	Charleston Columbia Georgetown Greenville-Spartenburg
Texas	
Dallas	Amarillo Austin Dallas/Fort Worth Lubbock Oklahoma City, OK San Antonio Tulsa, OK

Service ports	Ports of entry
Texas (continued):	
El Paso	Albuquerque, NM Columbus, NM El Paso Fabens Presidio Santa Teresa, NM
Houston	Houston-Galveston
* Port Arthur	Port Arthur
Laredo	Brownsville Del Rio Eagle Pass Hidalgo Laredo Progreso Rio Grande City Roma
Vermont	
St. Albans	Beecher Falls Burlington Derby Line Highgate Springs-Alburg Norton Richford St. Albans
Virginia	
Norfolk	Charleston, WV Front Royal Norfolk-Newport News Richmond-Petersburg
Virgin Islands, U.S.	
Charlotte Amalie	Charlotte Amalie, St. Thomas Christiansted, St. Croix Coral Bay, St. John Cruz Bay, St. John Frederiksted, St. Croix
Washington	
Seattle	Aberdeen Blaine Boundary Danville Ferry Frontier Laurier Lynden Metaline Falls Nighthawk Oroville Point Roberts Puget Sound Spokane Sumas

Service ports	Ports of entry
Wisconsin	
Milwaukee	Green Bay
	Manitowoc
	Marinette
	Milwaukee
	Racine
	Sheboygan

* Not a service port.

Dated: September 22, 1995.

SAMUEL H. BANKS,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, September 27, 1995 (60 FR 49971)]

LIST OF FOREIGN ENTITIES VIOLATING TEXTILE TRANSSHIPMENT AND COUNTRY OF ORIGIN RULES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This document notifies the public of foreign entities identified by Customs as having violated the textile transshipment rules. This list is authorized to be published by section 333 of the Uruguay Round Agreements Act.

FOR FURTHER INFORMATION CONTACT: For information regarding any of the operational aspects, contact Michael Compeau, Branch Chief, Seizures and Penalties Division, at 202–927–0762. For information regarding any of the legal aspects, contact Lars-Erik Hjelm, Office of Chief Counsel, at 202–927–6900.

SUPPLEMENTARY INFORMATION

BACKGROUND

Section 333 of the Uruguay Round Agreements Act (URAA) (Public Law 103–465, 108 Stat. 4809) (signed December 12, 1994), entitled Textile Transshipments, amended Part V of title IV of the Tariff Act of 1930 by creating a new section 592A (19 U.S.C. 1592A), which authorizes the Secretary of the Treasury to publish in the Federal Register, on a biannual basis, a list of the names of any producers, manufacturers, suppliers, sellers, exporters, or other persons located outside the Customs territory of the United States, when these entities have been issued a penalty claim under section 592 of the Tariff Act, for certain

violations of the customs laws, provided that certain conditions are satisfied.

The violations of the Customs laws referred to above are the following: (1) Using documentation, or providing documentation subsequently used by the importer of record, which indicates a false or fraudulent country of origin or source of textile or apparel products; (2) Using counterfeit visas, licenses, permits, bills of lading, or similar documentation, or providing counterfeit visas, licenses, permits, bills of lading, or similar documentation that is subsequently used by the importer of record, with respect to the entry into the customs territory of the United States of textile or apparel products; (3) Manufacturing, producing, supplying, or selling textile or apparel products which are falsely or fraudulently labelled as to country of origin or source; and (4) Engaging in practices which aid or abet the transshipment, through a country other than the country of origin, of textile or apparel products in a manner which conceals the true origin of the textile or apparel products or permits the evasion of quotas on, or voluntary restraint agreements with respect to, imports of textile or apparel products.

If a penalty claim has been issued with respect to any of the above violations, and no petition in response to the claim has been filed, the name of the party to whom the penalty claim was issued will appear on the list. If a petition, supplemental petition or second supplemental petition for relief from the penalty claim is submitted under 19 U.S.C. 1618, in accord with the time periods established by sections 171.32 and 171.33, Customs Regulations (19 CFR 171.32, 171.33) and the petition is subsequently denied or the penalty is mitigated, and no further petition, if allowed, is received within 30 days of the denial or allowance of mitigation, then the administrative action shall be deemed to be final and administrative remedies will be deemed to be exhausted. Consequently, the name of the party to whom the penalty claim was issued will appear on the list. However, provision is made for an appeal to the Secretary of the Treasury by the violator named on the list, for the removal of its name from the list. If the Secretary finds that such person or entity has not committed any of the enumerated violations for a period of not less than 3 years after the date on which the person or entity's name was published, the name will be removed from the list as of the next publication of the list.

Reasonable Care Required

New section 592A also requires any importer of record entering, introducing, or attempting to introduce into the commerce of the United States textile or apparel products that were either directly or indirectly produced, manufactured, supplied, sold, exported, or transported by such named person to show, to the satisfaction of the Secretary, that such importer has exercised reasonable care to ensure that the textile or apparel products are accompanied by documentation, packaging, and labelling that are accurate as to its origin. Reliance solely upon information regarding the imported product from a person named on

the list is clearly not the exercise of reasonable care. Thus, the textile and apparel importers who have some tangential relationship with one or more of the listed parties must exercise a degree of reasonable care in ensuring that the documentation covering the imported merchandise, as well as its packaging and labelling, is accurate as to the country of origin of the merchandise. This degree of reasonable care must rely on more than information supplied by the named party.

In meeting the reasonable care standard when importing textile or apparel products and when dealing with a party named on the list published pursuant to new section 592A of the Tariff Act of 1930, an importer should consider the following questions in attempting to ensure that the documentation, packaging, and labelling is accurate as to the country of origin of the imported merchandise. The list of questions is not exhaustive but is illustrative.

(1) Has the importer had a prior relationship with the named party?

(2) Has the importer had any detentions and/or seizures of textile or apparel products that were directly or indirectly produced, supplied, or transported by the named party?

(3) Has the importer visited the company's premises and ascertained that the company has the capacity to produce the merchandise?

(4) Where a claim of substantial transformation is made, has the importer ascertained that the named party actually substantially transforms the merchandise?

(5) Is the named party operating from the same country as is represented by that party on the documentation, packaging or labelling?

(6) Have quotas for the imported merchandise closed or are they nearing closing from the main producer countries for this commodity?

(7) What is the history of this country regarding this commodity?

(8) Have you asked questions of your supplier regarding the origin of the product?

(9) Where the importation is accompanied by a visa, permit, or license, has the importer verified with the supplier or manufacturer that the visa, permit, and/or license is both valid and accurate as to its origin? Has the importer scrutinized the visa, permit or license as to any irregularities that would call its authenticity into question?

The new law authorizes a biannual publication of the names of the foreign violators. In the first publication which covered the period ending on March 31, 1995, a Federal Register notice published on April 3, 1995 (60 FR 16917) notified the public that no foreign entity fell within the purview of the new law within the period from the enactment of the new law on December 12, 1994 to the March 31, 1995 first publication date. Accordingly, no list was published for the period ending March 31, 1995.

592A LIST

For the period ending September 30, 1995, Customs has identified 9 (nine) foreign entities that fall within the purview of new section 592A of the Tariff Act of 1930. These parties were assessed a penalty claim

under 19 U.S.C. 1592, for one or more of the four above-described violations. The administrative penalty action was concluded against the parties by one of the actions noted above as having terminated the administrative process.

The names and addresses of the 9 foreign parties are as follows:

Beijing Garments Import & Export, No. 22 Fu Wai Street, Beijing, China.

China Artex Corporation Guandong Company, 119 (2nd Building) Liuhua Road, Guangshou, China.

China National Silk, Shangdong Branch, Silk Building, Zhan Liu Gan Road, Qingdao, China.

Cotton Breeze International, 13/1578 Govindpuri, New Delhi, India.

Hangzhou Tongda Textile Group, Room 918, Hangzhou Mansion, No. 1 Wulin Square, Hangzhou, China.

Hebei Garment I/E Corporation, 8 Jichang Road, Shijazhuang, China.

Poshak International, H–83 South Extension, Part-I (Back Side), New Delhi, India.

Shangdong Silk, Silk Building, Zhan Liu Gan Road, Qingdao, China.

United Fashions, C–7 Rajouri Garden, New Delhi, India.

Any of the above parties may petition to have its name removed from the list. Such petitions, to include any documentation that the petitioner deems pertinent to the petition, should be forwarded to the Assistant Commissioner, Office of Field Operations, United States Customs Service, 1301 Constitution Avenue, Washington, DC 20229.

ADDITIONAL FOREIGN ENTITIES

Customs is soliciting information regarding the whereabouts of the following 40 foreign entities concerning alleged violations of section 592A. Their name and last known address are listed below:

Bahadur International, 250 Naraw Industrial Area, New Delhi, India.

Madan Exports, E–106 Krishna Nagar, New Delhi, India.

Gulnar Fashion Export, 14 Hari Nagar, Ashram, New Delhi, India.

Janardhan Exports, E–106 Krishna Nagar, New Delhi, India.

Morrin International, E–106 Krishna Nagar, New Delhi, India.

Jai Arjun Mfg., Co., B 4/40 Paschim,Vihar, New Delhi, India.

Eroz Fashions, 535 Tuglakabad Extension, New Delhi, India.

China Tiancheng Corp.,191 Changle, Shanghai, China.

China Artex Corp. Beijing Arts, 132–16 Changan Avenue, Beijing, China.

Shenzhen Long Gang Ji Chuen, Shenzhen, Long Gang Zhen, China.

Traffic, D1/180 Lajpat Nagar, New Delhi, India.

Raj Connections, E–106 Krishna Nagar, Delhi, India.

Bao An Wing Shing Garment Factory, Ado Shi Qu, Bao An Shen Zhen, China.

Guidetex Garment Factory, 12 Qian Jin Dong Jie, Yao Tai Xian Yuan Li, Canton, China.

Dechang Garment Factory, Shantou S.E.Z., Cheng Hai, Cheng Shing, China.

Guangdong Provincial Improved, 60 Ren Min Road, Guangdong, China.

Kin Cheong Garment Factory, No. 13 Shantan Street, Sikou Country, Taishan, Kwangtong, China.

Gold Tube Ltd., No. 55 Hung To Road, Kwun Tong, Kowloon, Hong Kong.

Sam Hing Bags Factory, Ltd., #35 Tai Ping West Road, Jiu Jaing, Ghangdong, China.

Luen Kong Handbag Factory, 33 Nanyuan Road, Shenzhen, Guangdong, China.

NH Industries Ltd., 1507–8A Nan Fung Centre, 264–298 Castle Peak Road, Kowloon, Hong Kong.

Daiphi Enterprise Co. Ltd., 1/FL., No. 6–2, Lane 78 Sung Chiang Rd., Taipei, Taiwan.

Changping High Stage Knitting, Yuan Jing Yuan, Chau Li Qu Chang, Guandong, China.

Arsian Company Ltd, XII Khorcolo, Waanbaatar, Mongolia.

Kin Fung Knitting Factory, Block A&B, 4th Flr Por Mee Bldg., 500 Casle Peak Rd., Kowloon, Hong Kong.

Cahaya Suria Sdn Bhd, Lot 5, Jalan 3, Kedah, Malaysia.

Domincan Do Sung Textile Co., Zona Franca Industrial, Bonca, Dominican Republic.

Crown Garments Factory Sdn Bhd, Lot 112, Jalan Kencana, Bagan Ajam, Malaysia.

Glee Dragon Garment Mfg. Ltd., 328 Castle Peak Rd., Room G 10Fl, Tsuen Kam Centre, Kowloon, Hong Kong.

Jentex Industrial Co., Ltd., P.O. Box 9–129, Rm 7–1, No. 246, Sec. 2, Chand-An Rd., Taipei, Taiwan.

Richman Garment Manufacturing Co., Ltd., 7th Fl, Singapore Industrial Bldg.,

338 Kwun Tong Road, Kowloon, Hong Kong.

Herrel Company , 64 Rowell Road, Suva, Fiji.

Belwear Co., Ltd., Flat C, 3rd Floor, Yuk Yat Street, Kowloon, Hong Kong.

Hambridge Ltd., 9 Fl., Lladro Building 72–80, Hoi Yuen Road, Kwun Tong, Kowloon, Hong Kong.

Kingston Garment Ltd., Lot 42–44 Caracas Dr., Kingston, Jamacia.

Moderntex International Inc., 3941, Kowloon, Hong Kong.

Poltex Sdn, 8 Jalan Serdang, Kedah, Malaysia.

Sam Hing International Enterprise, 5 Guernsey St., Guilford NSW, Australia.

Societe Prospere De Vetements S.A., Lome, Togo.

Yueh Wah Trading Co., Ltd., 6 Lane 299 Chung Cheng Road, Taipei, Taiwan.

If you have any information as to a correct mailing address for any of the above 40 firms, please send that information to: Assistant Commissioner, Office of Field Operations, United States Customs Service, 1301 Constitution Avenue, Washington, DC 20229.

Dated: September 22, 1995.

SAMUEL H. BANKS,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, September 28, 1995 (60 FR 50239)]

RECEIPT OF DOMESTIC INTERESTED PARTY PETITION CONCERNING COUNTRY OF ORIGIN MARKING FOR HINGES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of receipt of domestic interested party petition; solicitation of comments.

SUMMARY: Customs has received a petition filed on behalf of a domestic interested party concerning the country of origin marking requirements for metal hinges. The petitioner requests that Customs require imported metal hinges to be marked individually by a die sunk, molding

or etching process in a conspicuous place such as the exposed surface of the hinge. The petitioner contends that the country of origin marking on the container in which hinges are imported is not sufficient. Public comment is solicited regarding the application of the marking requirements to imported metal hinges.

DATES: Comments must be received on or before November 27, 1995.

ADDRESS: Comments (preferably in triplicate) may be submitted to the U.S. Customs Service, Regulations Branch, Office of Regulations and Rulings, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, DC 20229. Comments may be viewed at the Office of Regulations and Rulings, Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Monika Rice, Special Classification and Marking Branch, Office of Regulations and Rulings, U.S. Customs Service, (202–482–6980).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 516, Tariff Act of 1930, as amended (19 U.S.C. 1516) and Part 175, Customs Regulations (19 CFR Part 175), a domestic interested party may challenge certain decisions made by Customs regarding imported merchandise which is claimed to be similar to the class or kind of merchandise manufactured, produced or wholesaled by the domestic interested party. This document provides notice that a domestic interested party is challenging the marking requirements of imported metal hinges.

The petitioner is Hager Hinge Company, a domestic manufacturer of hinges. This entity qualifies as a domestic interested party within the meaning of 19 U.S.C. 1516(a)(2).

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin shall be marked in a conspicuous place with the English name of the country of origin. The country of origin marking requirements and exceptions of 19 U.S.C. 1304 are implemented by Part 134, Customs Regulations (19 CFR Part 134).

The hinges at issue are classifiable under subheading 8302.10.60 or subheading 8302.10.90, Harmonized Tariff Schedule of the United States (HTSUS), depending on the material of construction which basically is brass, aluminum, steel, or stainless steel. Hinges are stamped from dies with knuckles rolled, milled or reamed; assembled with bearings, if required; polished to remove impurities on the face or knuckle; and electroplated. Steel hinges are described as having great strength, which can be electroplated with various finishes, and are most commonly used in controlled environments, such as the interior of a building. Stainless steel hinges are also described as having great strength, are non-corrosive, and can be polished to either bright or satin finishes,

but may not be electroplated in the same manner as steel. Brass hinges are described as having less strength than steel or stainless steel, and may not be used on fire rated door applications, but may be electroplated with many finishes. Additionally, there are four basic types of hinges: Full Mortise (the most common, comprising 90 percent of all hinges used), Full Surface, Half Mortise, and Half Surface. A Full Mortise hinge is mortised to both the door and the frame; the Full Surface hinge is affixed to the surface (not recessed) of the door and the frame; the Half Mortise hinge is mortised to the door (recessed) and surface applied to the frame; and the Half Surface hinge is surface applied to the door and mortised to the frame (recessed). The hinges described above are stated to be sold through distributors for sale in hardware stores and home centers, and are also sold in bulk to general and sub-contractors for use in building construction.

The petitioner contends that the country of origin marking on these imported metal hinges be placed onto each individual hinge by a die sunk, molding or etching process in a conspicuous place such as the exposed surface of the hinge. The petitioner contends that the country of origin marking on the container in which the hinges are imported is not sufficient because, in practice, the hinges are often removed from their container before reaching the ultimate purchaser. In a retail setting, hinges may be removed from their container and sold from bulk bins for easy access and examination. Furthermore, in building construction, the petitioner contends that the building purchaser has less likelihood of ascertaining the country of origin which is important in determining the quality of a building's construction. The petitioner contends that despite the certification requirements imposed by 19 CFR 134.26 for repackaged articles, and the demand for liquidated damages under 19 CFR 134.54(a) for failure to adhere to the certification, anything less than individual marking on each metal hinge is statutorily insufficient. Consequently, the petitioner proposes that Customs require imported metal hinges to be marked individually by a die sunk, molding or etching process in a conspicuous place because as stated in 19 CFR 134.41, as a general rule, marking requirements are best met by marking worked into the article at the time of manufacture and it is suggested that the country of origin on metal articles be die sunk, molded, or etched.

COMMENTS

Pursuant to section 175.21(a), Customs Regulations (19 CFR 175.21(a)), before making a determination on this matter, Customs invites written comments from interested parties. The petition of the domestic interested party, as well as all comments received in response to this notice, will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), section 1.4, Treasury Department Regulations (31 CFR 1.4), and section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the

hours of 9:00 a.m. and 4:00 p.m. at the Regulations Branch, Suite 4000, Franklin Court, 1099 14th Street, N.W., Washington, DC.

AUTHORITY

This notice is published in accordance with section 175.21(a), Customs Regulations (19 CFR 175.21(a)).

DRAFTING INFORMATION

The principal drafter of this document was Monika Rice, Special Classification and Marking Branch, United States Customs Service. Personnel from other Customs offices participated in its development.

GEORGE J. WEISE,
Commissioner of Customs.

Approved: August 28, 1995.

JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, September 27, 1995 (60 FR 49970)]

DATES AND DRAFT AGENDA OF THE SIXTEENTH SESSION OF THE HARMONIZED SYSTEM COMMITTEE OF THE WORLD CUSTOMS ORGANIZATION

AGENCIES: U.S. Customs Service, Department of the Treasury, and U.S. International Trade Commission.

ACTION: Publication of the dates and draft agenda for the sixteenth session of the Harmonized System Committee of the World Customs Organization.

SUMMARY: This notice sets forth the dates and draft agenda for the next session of the Harmonized System Committee of the World Customs Organization.

DATE: September 26, 1995.

FOR FURTHER INFORMATION CONTACT: Myles B. Harmon, Director, International Nomenclature Staff, U.S. Customs Service (202–482–7000) or Eugene A. Rosengarden, Director, Office of Tariff Affairs and Trade Agreements, U.S. International Trade Commission (202–205–2592).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The United States is a contracting party to the International Convention on the Harmonized Commodity Description and Coding System ("Harmonized System Convention"). The Harmonized Commodity Description and Coding System ("Harmonized System"), an interna-

tional nomenclature system, forms the core of the U.S. tariff, the Harmonized Tariff Schedule of the United States. The Harmonized System Convention is under the jurisdiction of the World Customs Organization (established as the Customs Cooperation Council).

Article 6 of the Harmonized System Convention establishes a Harmonized System Committee ("HSC"). The HSC is composed of representatives from each of the contracting parties to the Harmonized System Convention. The HSC's responsibilities include issuing classification decisions on the interpretation of the Harmonized System. Those decisions may take the form of published tariff classification opinions concerning the classification of an article under the Harmonized System or amendments to the Explanatory Notes to the Harmonized System. The HSC meets twice a year in Brussels, Belgium. The next sessions of the HSC will be its sixteenth, and it will be held from November 6 to November 17, 1995.

In accordance with section 1210 of the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100–418), the U.S. Department of the Treasury, represented by the U.S. Customs Service, the U.S. Department of Commerce, represented by the Census Bureau, and the U.S. International Trade Commission ("ITC"), jointly represent the U.S. government at the sessions of the HSC. The Customs Service representative serves as the head of the delegation at the sessions of the HSC.

Set forth below is the draft agenda for the next session of the HSC. Copies of available agenda-item documents may be obtained from either the Customs Service of the ITC. Comments on agenda items may be directed to the above-listed individuals.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

[Attachment: Attachment A]

Attachment A
39.527 E

DRAFT AGENDA FOR THE SIXTEENTH SESSION OF THE HARMONIZED SYSTEM COMMITTEE

Monday, November 6, 1995 (3 p.m.) to Friday, November 17, 1995

N.B. Questions under Agenda Item VII will be examined first by the presessional Working party (Thursday, November 2, (10 a.m.) to Monday, November 6, 1995.)

I

ADOPTION OF THE AGENDA

Draft Agenda	Doc. 39.527
Draft Timetable	Doc. 39.528

II

REPORT BY THE SECRETARIAT

1. Position regarding Contracting Parties to the HS Convention; acceptances of Recommendations; list of administrations applying an HS-based tariff or statistical nomenclature; list of HS-based tariffs and tariff or statistical nomenclatures available in the Secretariat	Doc. 39.529
2. Report of the Policy Commission (33rd Session) and decisions taken by the Council at its 85th/86th Sessions	Doc. 39.530
3. Approval of decisions taken by the Harmonized System Committee at its 15th Session	Docs. 39.457 39.531
4. Technical assistance activities of the Nomenclature and Classification Directorate	Doc. 39.532
5. Progress report on the HS Commodity Data Base	Doc. 39.533
6. Other	

III

GENERAL QUESTIONS

1. Formal adoption by the Harmonized System Committee of amendments by corrigendum to the Explanatory Notes provisionally approved at its 15th Session	Doc. 39.534
2. Creation of a database of CCCN/HS documentation	Doc. 39.535
3. Pre-entry classification information system	Doc. 39.505
4. Questionnaire on the application of the Harmonized System in areas other than Customs tariffs and trade statistics	Doc. 39.536
5. Project for improving classification work and related infrastructures	Doc. 39.537
6. International co-operation for the development of audiovisual training materials on the Harmonized System	Doc. 39.538
7. Possible amendment of Rule 18 of the Harmonized System Committee Rules of Procedures (quorum)	Doc. 39.539
8. Classification enquiries from private firms	Doc. 39.577
9. Other	

IV

REPORT OF THE SCIENTIFIC SUB-COMMITTEE Doc. 39.480

V

REPORT OF THE HS REVIEW SUB-COMMITTEE

VI

RECOMMENDATIONS RELATING TO THE HARMONIZED SYSTEM

VII

REPORT OF THE PRESESSIONAL WORKING PARTY Doc. 39.590

REPORT OF THE PRESESSIONAL WORKING PARTY—continued

VIII

FURTHER STUDIES

IX

NEW QUESTIONS

X

OTHER BUSINESS

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* HSC/15
** HSC/14

XI

ELECTIONS OF CHAIRMEN AND VICE-CHAIRMEN OF THE HARMONIZED SYSTEM COMMITTEE AND ITS WORKING PARTY AND OF THE HS REVIEW SUB-COMMITTEE

XII

DATES OF THE NEXT SESSIONS

SCIENTIFIC SUB-COMMITTEE

10th Session

Monday, January 22, 1996
Friday, January 26, 1996

#HS REVIEW SUB-COMMITTEE

13th Session

Monday, February 19, 1996
Friday, March 1, 1996

HARMONIZED SYSTEM COMMITTEE

Working Party

Wednesday, April 24, 1996
Friday, April 26, 1996

17th Session

Monday, April 29, 1996
Friday, May 10, 1996

Subject to change at a later stage.

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, September 27, 1995.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF MEN'S WOVEN SHIRTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), tilts notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of certain men's woven shirts. Notice of the proposed revocation was published August 16, 1995, in the CUSTOMS BULLETIN.

DATE: Merchandise entered or withdrawn from warehouse for consumption on or after December 11, 1955.

FOR FURTHER INFORMATION CONTACT: Josephine Baiamonte Textile Classification Branch, (202) 482–7058.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On August 16, 1995, Customs published a notice in the CUSTOMS BULLETIN, Volume 29, Number 33, proposing to revoke District ruling letter (DD) 897763, dated June 6, 1994. That ruling classified certain men's woven shirts in heading 6211, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), as men's or boys' other garments. This office has reviewed the decision in DD 897763 and it is our opinion that it is in error. It is the opinion of this office that the subject men's woven shirts are more specifically provided for in heading 6205, HTSUSA.

No comments were received in response to our notice of intent to revoke DD 897763.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking DD 897763 to reflect the proper classification of the men's woven shirts in heading 6205, HTSUSA. HQ 957876 revoking DD 897763 is set forth as an attachment to this document.

Publication of rulings or decisions pursuant to section 623 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: September 20, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, September 20, 1995.

CLA–2 R:C:T 957876 jb
Category: Classification
Tariff No. 6205.30.2050

MS. MICHELLE CREBBIN
JANTZEN INC.
P.O. Box 3001
Portland, OR 97208–3001

Re: Revocation of DD 897763; woven shirts with rib knit waistbands not excluded from heading 6205, HTSUSA; HQ 085802; HQ 088528; HQ 081616; HQ 082467.

DEAR MS. CREBBIN:

In District ruling (DD) 897763, dated June 6, 1994, Customs classified a men's woven shin of man-made fibers in heading 6211, HTSUSA. After careful review of that ruling we have determined that it is in error.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed revocation of DD 897763 was published August 16, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 33.

Facts:

The subject merchandise consists of a men's woven shirt, referenced style number IM322, made up of two types of fabric. The upper body and sleeves are 65 percent polyester and 35 percent woven cotton. The lower body is composed of 60 percent cotton and 40 percent polyester knit fabric. The garment also features a knit shirt collar, a three button placket neck opening, short sleeves and a rib knit waistband.

In DD 897763, the subject garment was classified in heading 6211, HTSUSA as a men's or boys' other garment, shins excluded from heading 6205, HTSUSA. The garment was

precluded from classification in heading 6205, HTSUSA, because it featured a rib knit waistband.

Issue:

Whether the garment is properly classifiable in heading 6205, HTSUSA, as a men's shirt or in heading 6211, HTSUSA, as an other garment?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of interpretation (GRI). GRI 1 provides that classification shall be determined according to the rules of the headings and any relative section or chapter notes, taken in order. Merchandise that cannot be classified in accordance with GRI I is to be classified in accordance with subsequent GRI.

Heading 6205, HTSUSA, provides for men's or boys' shirts. The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN) for chapter 62, HTSUSA, state:

> Shirts and shirt-blouses are garments designed to cover the upper part of the body, having long or short sleeves and a full or partial opening starting at the neckline.

The EN to heading 6205, HTSUSA, further state:

> The heading **does not cover** garments having the character of wind-cheaters, wind-jackets, etc., of **heading 62.01,** which generally have a tightening at the bottom, or of jackets of **heading 62.03**, which generally have pockets below the waist. Sleeveless garments are also **excluded.**

The EN to heading 6205, HTSUSA, clearly exclude from its provisions only those garments which have the character of wind jackets of heading 6201, HTSUSA, and jackets of heading 6203, HTSUSA. Although the subject garment features a type of tightening at the waist, it neither exhibits the character of a wind jacket nor of a jacket of heading 6203, HTSUSA. Furthermore, Customs has held similar garments featuring tightening at the waist to be classifiable as shirts of heading 6205, HTSUSA. *See,* HQ 081616, dated September 27, 1988; HQ 082467, dated August 24,1989; HQ 085802, dated November 21, 1989; and HQ 088528, dated May 28, 1991.

Accordingly, DD 897763 is revoked. The proper classification for the subject merchandise is as a men's shin in heading 6205, HTSUSA.

Holding:

The subject men's shirt, referenced style number IM322, is property classifiable in subheading 6205.30.2050, HTSUSA, which provides for men's or boys' shirts: of man-made fibers: other: other; other: with two or more colors in the warp and/or the filling: men's. The applicable rate of duty is 30.7 cents per kilogram plus 27.3 percent *ad valorem* and the textile category is 640.

The designated and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, we suggest you check, dose to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)* an issuance of the Customs Service which is updated weekly and is available at the local Customs office.

Due to die changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact the local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177. 10(c)(1), Customs Regulations (19 CIR 177.10(c(1)).

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF SYNTHETIC IRON OXIDES

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of synthetic iron oxides. Notice of the proposed modification was published August 9, 1995, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after December 11, 1995.

FOR FURTHER INFORMATION CONTACT: Ann Segura Minardi, Food and Chemicals Classification Branch, (202–482–6958).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On August 9, 1995, Customs published a notice in the CUSTOMS BULLETIN, Volume 29, Number 32, proposing to modify New York Ruling Letter (NYRL) 851269, dated May 21, 1990, which classified four synthetic iron oxides products, separately identified as, "Granufin (R)" red, "Granufin (R)" yellow, "Granufin (R)" black, and "Granufin (R)" mixture (red, yellow, black), under subheading 3206.49.5000, Harmonized Tariff Schedule of the United States (HTSUSA), which provides for "Inorganic products of a kind used as luminophores." One comment was received in response to this notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested paities that Customs is modifying NYRL 851269 to reflect the proper classification of "Granufin (R)", red, "Granufin (R)" yellow, "Granufin (R)", black, and "Granufin (R)" mixture (red, yellow, black), respectively, under subheadings 2321.10.0020, HTSUSA; 2821.10.0030, HTSUSA; 2821.10.0010, HTSUSA; and 2821.10.0040, HTSUSA, as "Iron oxides and hydroxides; earth colors containing 70 percent or more by weight of combined iron evaluated as FE_2O_3: Iron oxides and hydroxides: Synthetic pigments: * * *". The general column one rate of duty is 3.7% *ad valorem*.

Please note a change in classification for the "Granufin (R)" mixture which was classified under subheading 3206.49.2000, HTSUSA, as "Other coloring matter * * *" in the proposed modification of NYRL 851269, and published in the CUSTOMS BULLETIN on August 9, 1995. In

response to the comment received, and after careful consideration, we have determined that the "Granufin (R)" mixture of red, yellow, and black iron oxide is properly classified as an iron oxide under subheading 2821.10.0040, HTSUSA. Headquarters Ruling Letter 957503 modifying NYRL 851269, is set forth in the Attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1).

Dated: September 26, 1995.

JOHN B. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, September 26, 1995.

CLA–2 R:C:F 957503 ASM
Category: Classification
Tariff No. 2821.10.0010, 2821.10.0020,
2821.10.0030 and 2821.10.0040

MR. STEVEN MCGEE
BROCKHUES CORP.
4151 Memorial Dr.
Suite 210–B
Decatur, GA 30032

Re: Modification of NYRL 851269 concerning the tariff classification of "Granufin (R)" synthetic iron oxides from West Germany.

DEAR MR. MCGEE:

This letter concerns the modification of New York Ruling letter (NYRL) 851269, dated May 21, 1990, regarding the classification of "Granufin (R)" synthetic iron oxides from West Germany. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed revocation of NYRL 851269 was published on August 9, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 32.

Facts:

The product, "Granufin (R)" synthetic iron oxide, is not a single compound. According to the specifications provided by the importer, they are mixtures of FE_2O_3 (82% to 91%) plus SIO_2 and AL_2O_3 (approximately 3%), plus a dust binding additive (approximately 4%).

On May 21, 1990, NYRL 851269, classified these products as follows:

Description	Classification	Duty rate *(ad valorem)*
"Granufin (R)" Red Iron Oxide	3206.49.5000	3.1%
"Granufin (R)" Yellow Iron Oxide	3206.49.5000	3.1%
"Granufin (R)" Black Iron Oxide	3206.49.5000	3.1%
"Granufin (R)" Mixtures of the above	3206.49.5000	3.1%

Issue:

What is the proper classification under the HTSUSA for the "Granufin (R)" synthetic iron oxide products identified above?

Law and Analysis:

Classification of merchandise under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI's). As stated in GRI 1, the classification is determined first in accordance with the terms of the headings which must be read in conjunction with the relative section and chapter notes. If GRI 1 fails to classify the goods and if the headings and legal notes do not otherwise require, the remaining GRI's are applied in their appropriate order. The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN's), facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI's.

Initially, we classified all four synthetic iron oxide products under subheading 3206.49.5000, HTSUSA, because we believed that approximately 9% to 18% of the material contained in the product played a role in the formation of color. At this time, however, we have been advised that there are no additional modifying pigments present in these products. In fact, the SIO_2 and AL_2O_3 contained in the product is a residue, the dust binding additive (4%) may be lignin sulfate, and any remaining balance of material contained in the product is only water.

In the HTSUSA, Note 1.(e), Chapter 28, specifically permits the addition of "antidusting" agents, provided the addition does not render the product particularly suitable for specific use rather than for general use. Thus, we are now classifying the four synthetic iron oxides as follows:

Description	Classification	Duty rate *(ad valorem)*
"Granufin (R)" Red Iron Oxide	2821.10.0020	3.7%
"Granufin (R)" Yellow Iron Oxide	2821.10.0030	3.7%
"Granufin (R)" Black Iron Oxide	2821.10.0010	3.7%
"Granufin (R)" Mixtures of the above	2821.10.0040	3.7%

After careful consideration, we have determined that "Granufin (R)" mixture of red, yellow, and black iron oxide is properly classified under heading 2821, HTSUSA. Please note this change in classification for the "Granufin (R)" mixture which was classified under subheading 3206.49.2000, HTSUSA, as "Other coloring matter * * *" and set forth in the proposed modification of NYRL 851269.

Holding:

The synthetic iron oxides which are separately identified as "Granufin R" red, yellow, and black, and "Granufin (R)" mixture of red, yellow, and black, are properly classified in Chapter 28, as "Iron oxides and hydroxides; earth colors containing 70 percent or more by weight of combined iron evaluated as FE_2O_3: Iron oxides and hydroxides: Synthetic pigments: * * *" under the following subheadings: 2821.10.0010, HTSUSA, for the black synthetic pigment; 2821.10.0020, HTSUSA, for the red synthetic pigment; and 2821.10.0030, HTSUSA, for the yellow synthetic pigment; and 2821.10.0040, HTSUSA, for the mixture of the aforementioned. The general column one rate of duty is 3.7% *ad valorem*.

NYRL 851269, dated May 21,1990, is hereby modified. In accordance with section 623, this ruling will become effective 60 days alter its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN B. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED MODIFICATION OF CUSTOMS RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF INTRAVENOUS SOLUTION ADMINISTRATION SETS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letters.

SUMMARY: Pursuant to § 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by § 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify rulings pertaining to the tariff classification of intravenous solution administration sets. Comments are invited on the of the proposed rulings.

DATE: Comments must be received on or before November 13, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, DC, 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., N. W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Kathleen Clarke, Commercial Rulings Division, (202) 482–7063 or 7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to § 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by § 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify rulings pertaining to the tariff classification of intravenous solution administration sets.

In New York (NY) 846330 dated November 8, 1989, the Area Director of Customs, New York Seaport, classified the "Rate-Mate" I.V. administration set under subheading 9018.90.70, Harmonized Tariff Schedule of the United States (HTSUS), as other electro-medical instruments and appliances. This ruling letter is set forth in Attachment A to this document. Additionally, in NY 895684 dated April 15, 1994, the Area Director of Customs, New York Seaport, classified the "Accuset" intravenous solution administration set as parts and accessories of other electro-medical instruments and appliances under subheading 9018.90.75, HTSUS. This ruling letter is set forth in Attachment B to this document.

Customs is of the opinion that the "Rate-Mate" and "Accuset" intravenous solution administration sets are classifiable as other medical instruments and appliances and as accessories to pumps. Therefore, pursuant to Note 2(a), Chapter 90, HTSUS, the intravenous solution administration sets are classified as other medical instruments and appliances under subheading 9018.90.80, HTSUS. Customs intends to modify NY 846330 and NY 895684 to reflect this tariff classification. Proposed HRL 958098 modifying NY 846330 is set forth in Attachment C, and proposed HRL 957817 modifying NY 895684 is set forth in Attachment D to this document.

Claims for detrimental reliance under § 177.9, Customs Regulations (19 CFR § 177.9), will not be entertained for actions occurring on or alter the date of publication of this notice.

Dated: September 22, 1995.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, November 8, 1989.

CLA-2-90:S:N:N1:119 846330
Category: Classification
Tariff No. 9018.90.8000 and 9018.90.7080

MR. JOSEPH T. SMITH, JR.
IMPORT MANAGER
BURLINGTON AIR IMPORTS
P.O. Box 2884
So. San Francisco, CA 94083-2884

Re: The tariff classification of solution administration sets from Japan.

DEAR MR. SMITH:

In your letter dated October 5, 1989, on behalf of Critikon, Inc., you requested a tariff classification ruling.

You submitted two samples. The standard solution administration set sample, consists of approximately 100 inches of plastic tubing with the following attached components: universal inlet spike with cap, drip chamber, chock valve, slide clamp, two Y-injection sites, and male luer lock connector with cap. The "Rate-Mate" I.V. administration set sample is similar to the standard set but contains in addition a roller clasp and a cassette which fits into a "Roteminder V" volumetric infusion pump (not being imported) which electronically controls the rate of flow of the liquid to be administered. The "Rate-Mate" administration set can be used only with the infusion pump.

The inquirer states that the standard administration set is cut after importation and a cassette is added. Merchandise is classifiable in its imported condition, therefore what may be done to modify the standard set after importation does not affect its classification at time of entry. The "Rate-Mate" I.V. administration set is also imported finished with the attached cassette.

The applicable subheading for the standard solution administration set will be 9018.90.8000, Harmonized Tariff Schedule of the United States (HTS), which provides for instruments and appliances used in medical, surgical, dental or veterinary sciences, * * * other, other. The rate of duty will be 7.9 percent.

The "Rate-Mate" I.V. administration set is classifiable under subheading 9018,90.7080, HTS, which provides for other electro-medical instruments and appliances. The rate of duty will be 4.2 percent.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have already been filed, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
New York, NY, April 15, 1994.
CLA–2–90:S:N:N3:119 895684
Category: Classification
Tariff No. 9018.90.8000 and 9018.90.7560

KENT PAULSEN
CAL PACIFICO OF CALIFORNIA
1300 Quail Street, Suite 208
Newport Beach, CA 92860–2777

Re: The tariff classification and status under the North American Free Trade Agreement (NAFTA), of Solution Administration sets-from Mexico.

DEAR MR. PAULSEN:

In your letter dated February 26, 1994, received March 16, 1994 by this office, you requested a ruling on the status of two solution administration sets from Mexico under the NAFTA. The request is being made on behalf of Imed Corporation, San Diego, CA.

The two sets are assembled in Mexico from components made in the United States, Ireland, Italy or other foreign countries and are marketed under the names Gemini and Accuset.

The various components used in the two sets include drip chamber, Y site, slide clamp, roller clamp, luer adapter and protection cap. The Accuset has a cassette attached which fits into an electronic infusion pump. It is apparent from the drawing furnished that the Accuset is dedicated for use with the punp and would not be used otherwise

A section of the tubing of the Gemini set is made of silicon rubber which is more resilient than plastic and is suitable to he used with the type of pump which regulates the flow of liquid by compressing and releasing that part of the tubing. The Gemini set can operate by gravity just is any other standard solution administration set and will be classified accordingly.

With the exception of the cassette All the foreign components used in the two sets are classifiable in 9018.90.8000 since they are used principally in standard solution administration sets or in some cases such sets as well as in articles of 9018.39.0000.

The applicable tariff provision for the Gemini solution administration set will be 9013.90.8000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for instruments and appliances used in medical, surgical, dental or veterinary sciences * * * parts and accessories thereof * * * other. The general rate of duty will be 7.9 percent .

The applicable tariff provision for the Accuset solution administration set, will be 9018.90.7560, HTSUSA, which provides for electro-medical Instruments and appliances and parts and accessories thereof * * * other. The general rate of duty will be 4.2 percent.

The two solution administration sets do not qualify for preferential treatment under the NAFTA for the following reasons.

The Gemini and Accuset solution administration sets will not be made exclusively from originating materials.

The non-originating materials (other than the cassette) used in the production of the Gemini and Accuset administration sets will not undergo the change in tariff classification required by General Note 12(t)/90 HTSUSA, line 46: A change to subheading 9018.90 from any other heading.

The Gemini solution administration set will not meet the exception to the above tariff classification change rules regarding goods and parts hereof classifiable in the same heading or subheading as stated in General Note 12(b)(iv)(B): "the tariff headings for such goods provide for and specifically describe both the goods themselves and their parts and is not further divided into subheadings, or the subheadings for such goods provide for and specifically describe both the goods themselves and their parts". The Gemini set and the parts are provided for in a basket provision that does not specifically describe the goods themselves and the parts.

The Accuset solution administration set will not meet the exception to the above tariff classification change rules regarding goods and parts thereof classifiable in the same heading or subheading as stated in General Note 12(b)(iv)(B)—cited above—because the set and some of the non-originating materials are classified in two different subheadings of the same heading.

This ruling is being issued under the provisions of Part 181 of the Customs Regulations (19 C.F.R. 181).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

Should you wish to request an administrative review of this ruling, submit a copy of this ruling and all relevant facts and arguments within 30 days of the date of this letter, to the Director, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Ave. N.W., Franklin Court, Washington, DC 20229.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC

CLA-2 R:C:M 958098 KCC
Category: Classification
Tariff No. 9018.90.80

MR. JOSEPH T. SMITH, JR.
IMPORT MANAGER
BURLINGTON AIR IMPORTS
P.O. Box 2884
San Francisco, CA 94083-2884

Re: NY 846330 modified; "Rate-Mate" intravenous administration set; 9018.90.70; other electro-medical instruments; other medical instruments and appliances; parts; accessories; HRLs 085088, 087704 and 951857; Note 2(a) and (b), Chapter 90.

DEAR MR. SMITH:

This is in regards to New York Ruling (NY) 846330 dated November 8, 1989, issued to you on behalf of Critikon, Inc., in which the Area Director of Customs, New York Seaport, classified the "Rate-Mate" intravenous administration set as other electro-medical instruments and appliances under subheading 9018.90.70, Harmonized Tariff Schedule of the

United States (HTSUS). We have reviewed this ruling and believe that it needs to be modified as follows.

Facts:

In NY 846330 dated November 8, 1989, the Area Director of Customs, New York Seaport, classified the "Rate-Mate" intravenous administration set as other electro-medical instruments and appliances under subheading 9018.90.70, HTSUS. NY 846330 described the "Rate-Mate" intravenous administration set as:

> * * * similar to the standard set but contains in addition a roller clamp and a cassette which fits into a "Rateminder V" volumetric infusion pump (not being imported) which electronically controls the rate of flow of the liquid to be administered. The "Rate-Mate" administration set can be used only with the infusion pump.

We note that subheading 9018.90.70, HTSUS, is unchanged but has been renumbered for the 1995 HTSUS to subheading 9018.90.75, HTSUS.

Issue:

Is the "Rate-Mate" intravenous administration set classified under subheading 9018.90.75, HTSUS, as other electro-medical instruments and appliances?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRIs). GRI 1, HTSUS, states, in pertinent part, that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *." The subheadings at issue are as follows:

9018.90	Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof * * *. Other instruments and appliances and parts and accessories thereof * * *
9018.90.75	Other * * * Electro-medical instruments and appliances and parts and accessories thereof * * * Other * * * Other * * *.
9018.90.80	Other * * *Other.

In HRL 085088 dated March 12, 1990, we considered the classification of an intravenous administration set, which consisted of 49 inches of plastic tubing, with a drip chamber and spike at one end, and a needle adapter with a protective covering at the other end. The intravenous administration set was used for the intravenous application of medication, blood serum, glucose solution and sodium chloride solution. We determined that the set was not classifiable as an electro-medical instrument, nor a part or an accessory of an electro-medical instrument, but as a medical instrument or appliance under subheading 9018.90.80, HTSUS. In reaching this conclusion, we stated as follows:

> The I.V. Administration Set in question is not an electro-medical instrument or appliance, since it does not operate by using electricity. Since the electrical functioning of a dialysis machine does not depend upon the use of an I.V. Administration Set, the I.V. Administration Set is not a part of such a machine. Nor is the I.V. Administration Set, an accessory of an electro-medical instrument, since the set does not supplement or assist the functioning of the machine. An I.V. Administration Set is merely the disposable conduit through which blood flows between the patient and the machine. The set is used once and then thrown away. Such a conveyance system is not a part or an accessory.

Similarly, the "Rate-Mate" intravenous administration set under consideration, is not an electro-medical instrument or appliance. Moreover, even though designed for use with the "Rateminder V" pump, it cannot be classified as a part of the pump. Generally, a part of an article "must be an internal, constituent or component part, without which the article to which it is joined could not function." *See,* HRL 951857 dated August 14, 1992. The pumps cannot pump liquid from a source bag or bottle to a patient without the addition of the "Rate-Mate" intravenous administration set. However, as a photographic camera is a complete machine without the film, the pump is a complete machine without the "Rate-Mate" intravenous administration set. A camera's components, such as the shutter release, film advance lever, rewind knob and viewfinder eyepiece, function without the addition of the film. Similarly, the components of the pump function without the addition of the "Rate-Mate" intravenous administration set. A photographic camera, when imported

without film, is classified according to GRI 1, HTSUS, under heading 9006, HTSUS (photographic cameras), rather than as a GRI 2(a), HTSUS, "incomplete or unfinished" articles. The pump, if imported without the "Rate-Mate" intravenous administration set, would be classified according to GRI 1, HTSUS, under heading 9018, HTSUS (medical apparatus). Therefore, it is our opinion that the "Rate-Mate" intravenous administration set is not classified as parts of the pumps under subheading 9018.90.75, HTSUS.

However, it is our opinion that the "Rate-Mate" intravenous administration set is classified as an accessory to the pump, and is classifiable under subheading 9018.90.75, HTSUS. The term "accessory" is not defined in either the HTSUS or the Explanatory Notes of the Harmonized Commodity Description and Coding System. An accessory is generally an article which is not necessary to enable the goods with which it is used to fulfill their intended function. An accessory must be identifiable as being intended solely or principally for use with a specific article. Accessories are of secondary or subordinate importance, not essential in and of themselves. They must, however, somehow contribute to the effectiveness of the principal article (e.g., facilitate the use or handling of the principal article, widen the range of its uses, or improve its operation.) *See,* HRL 087704 dated September 27, 1990; and HRL 951857.

As stated in HRL 085088, it is our opinion that disposable solution administration sets which serve as a conduit through which blood flows between the patient and the machine are medical instruments or appliances in and of themselves and, therefore, are classified under subheading 9018.90.80, HTSUS. Generally, they are not classified as accessories of the pumps. However, in this case the "Rate-Mate" intravenous administration set, by its design does appear to facilitate the use of the pump. Features such as the cassette help regulate the rate and flow of liquid passing through the pump. Therefore, the "Rate-Mate" intravenous administration set is also viewed as accessories to the pump.

In this situation, where the "Rate-Mate" intravenous administration set is classifiable as medical instruments and apparatus and as accessories of pumps, Note 2, Chapter 90, HTSUS, states that:

> * * * parts and accessories for machines, apparatus, instruments or articles of this chapter are to be classified according to the following rules:
>
> (a) Parts and accessories which are goods included in any of the headings of this chapter or of chapter 84, 85 or 91 (other than heading 8485, 8548 or; 9033) are in all cases to be classified in their respective headings;
>
> (b) Other parts and accessories, if suitable for use solely or principally with a particular kind of machine, instrument or apparatus, or with a number of machines, instruments or apparatus of the same heading (including a machine, instrument or apparatus of heading 9010, 9013 or 9031) are to be classified with the machines, instruments or apparatus of that kind * * *.

Therefore, pursuant to Note 2(a), Chapter 90, HTSUS, as the "Rate-Mate" intravenous administration set is classifiable as medical instruments and apparatus in heading 9018, HTSUS, it must be so classified, regardless of whether it is also classifiable as accessories of pumps. Pursuant to Note 2(a), Chapter 90, HTSUS, the "Rate-Mate" intravenous administration set is classified under subheading 9018.90.80, HTSUS, as other medical instruments and appliances.

Holding:

The "Rate-Mate" intravenous administration set is classified under subheading 9018.90.80, HTSUS, as other medical instruments and appliances. Articles classified under this tariff provision are dutiable at the Column 1 rate of 6.3% *ad valorem*.

NY 846330 is modified as set forth above.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 R:C:M 957817 KCC
Category: Classification
Tariff No. 9018.90.80

S. RICHARD SHOSTAK, ESQ.
STEIN SHOSTAK SHOSTAK & O'HARA
515 South Figueroa Street, Suite 1200
Los Angeles, CA 90071–3329

Re: NY 895684 modified; "Accuset" and "Gemini" intravenous solution administration sets; 9018.90.75; parts and accessories of other electro-medical instruments; other medical instruments and appliances; parts; accessories; HRLs 085088, 087704 and 951857; Note 2(a) and (b), Chapter 90.

DEAR MR. SHOSTAK:

This is in regards to your letter dated April 6, 1995, on behalf of Cal Pacifico and IMED Corporation, requesting reconsideration of New York (NY) 895684 dated April 15, 1994, in which the Area Director of Customs, New York Seaport, classified the "Accuset" intravenous solution administration sets as parts and accessories of other electro-medical instruments and appliances under subheading 9018.90.75, Harmonized Tariff Schedule of the United States (HTSUS), and the "Gemini" intravenous solution administration sets as other medical instruments and appliances under subheading 9018.90.80, HTSUS. Specifically, your reconsideration request only concerns the tariff classification of the "Gemini" intravenous solution administration sets. Samples were submitted for our examination. Information submitted at a meeting on August 16, 1995, was taken into consideration in rendering this decision.

Facts:

In NY 895684 the Area Director of Customs, New York Seaport, classified the "Accuset" intravenous solution administration sets ("Accuset" sets) as parts and accessories of other electro-medical instruments and appliances under subheading 9018.90.75, HTSUS. NY 895684 found that the "Gemini" intravenous solution administration sets ("Gemini" sets) could operate by gravity as any other standard intravenous solution administration sets and therefore, classified the "Gemini" sets as other medical instruments and appliances under subheading 9018.90.80, HTSUS. Additionally, NY 895684 held that at these sets were not eligible for preferential tariff treatment under the North American Free Trade Agreement (NAFTA) pursuant to General Note 12(b)(iv)(B), HTSUS. However, in Headquarters Rulling Letter (HRL) 956751 dated October 12, 1995, for purposes of NAFTA, we held that the "Accuset" and "Gemini" sets were both considered "originating goods" pursuant to General Note 12(b)(iv)(B), HTSUS, upon meeting the applicable value content requirement and all other applicable requirements. As HRL 956751 dealt solely with the NAFTA issue, it assumed the classification of the "Accuset" and "Gemini" sets in NY 895684 were correct.

You state that the classification of the "Accuset" sets under subheading 9018.90.75, HTSUS, in NY 895684 and HRL 956751, is correct. You now contend that the "Gemini" sets are also classified under subheading 9018.90.75, HTSUS, as parts and accessories of other electro-medical instruments and appliances. Although your reconsideration request concerns only the "Gemini" sets, it is our opinion that an examination of both the "Gemini" and "Accuset" sets is necessary.

The articles under consideration are the "Accuset" and "Gemini" intravenous solution administration sets which are disposable I.V. tubing assemblies used in the medical industry for infusions. Both intravenous solution administration sets are composed of a drip chamber, Y site, slide clamp, roller clamp, luer adapter and protection cap. The "Accuset" sets has an additional component, a cassette, which will fit into an electronic infusion pump. A section of the tubing in the "Gemini" Sets is made of silicon rubber which is more resilient than plastic and is suitable for use with the type of pump which regulates the flow of liquid by compressing and releasing the silicon tubing. You contend that the "Accuset" and "Gemini" sets are designed, function, marketed and used with pumps, and, therefore, are to be classified as parts or accessories of the pumps.

Issue:

Are the "Accuset" and "Gemini" sets classified under subheading 9018.90.75, HTSUS, as parts and accessories of other electro-medical instruments and appliances, or under subheading 9018.90.80, HTSUS, as other medical instruments and appliances?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRIs). GRI 1, HTSUS, states, in pertinent part, that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *." The subheadings at issue are as follows:

9018.90	Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments, parts and accessories thereof * * *. Other instruments and appliances and parts and accessories thereof * * *
9018.90.75	Other * * * Electro-medical instruments and appliances and parts and accessories thereof * * * Other * * * Other * * *
9018.90.80	Other * * * Other.

You contend that the "Accuset" and "Gemini" sets are classifiable as parts or accessories of an electro-medical instrument under heading 9018, HTSUS. It is our opinion that the "Accuset" and "Gemini" sets are not classifiable as parts or accessories of the pump, but as medical instruments and appliances under heading 9018, HTSUS.

In HRL 085088 dated March 12, 1990, we considered the classification of an I.V. administration set, which consisted of 49 inches of plastic tubing, with a drip chamber and spike at one end, and a needle adapter with a protective covering at the other end. The I.V. administration set was used for the intravenous application of medication, blood serum, glucose intravenous solution and sodium chloride intravenous solution. We determined that the set was not classifiable as an electro-medical instrument, nor a part or an accessory of an electro-medical instrument, but as a medical instrument or appliance under subheading 9018.90.80, HTSUS. In reaching this conclusion, we stated as follows;

> The I.V. Administration Set in question is not an electro-medical instrument or appliance, since it does not operate by using electricity. Since the electrical functioning of a dialysis machine does not depend upon the use of an I.V. Administration Set, the I.V. Administration Set is not a part of such a machine. Nor is the I.V. Administration Set an accessory of an electro-medical instrument, since the set does not supplement or assist the functioning of the machine. An I.V. Administration Set is merely the disposable conduit through which blood flows between the patient and the machine. The set is used once and then thrown away. Such a conveyance system is not a part or an accessory.

Similarly, the "Accuset" and "Gemini" sets under consideration, though designed for use with pumps, cannot be classified as a part of the pump. Generally, a part of an article "must be an internal, constituent or component part, without which the article to which it is joined could not function." *See*, HRL 951857 dated August 14, 1992. The pumps cannot pump liquid from a source bag or bottle to a patient without the addition of the "Accuset" or "Gemini" sets. However, as a photographic camera is a complete machine without the film, the pumps are a complete machine without the "Accuset" or "Gemini" sets. A camera's components, such as the shutter release, film advance lever, rewind knob and viewfinder eyepiece, function without the addition of the film. Similarly, the components of the pump function without the addition of the "Accuset" or "Gemini" sets. A photographic camera, when imported without film, is classified according to GRI 1, HTSUS, under heading 9006, HTSUS (photographic cameras), rather than as a GRI 2(a), HTSUS, "incomplete or unfinished" articles. The pumps, if imported without the "Accuset" or "Gemini" sets, would be classified according to GRI 1, HTSUS, under heading 9018, HTSUS (medical apparatus). Therefore, it is our opinion that the "Accuset" and "Gemini" sets are not classified as parts of the pumps under subheading 9018.90.75, HTSUS.

Alternatively, you contend that the "Accuset" and "Gemini" sets are accessories to the pumps, and are classifiable under subheading 9018.90.75, HTSUS. The term "accessory" is not defined in either the HTSUS or the Explanatory Notes of the Harmonized Commodity Description and Coding System. An accessory is generally an article which is not necessary to enable the goods with which it is used to fulfill their intended function. An accessory must be identifiable as being intended solely or principally for use with a specific article.

Accessories are of secondary or subordinate importance, not essential in and of themselves. They must, however, somehow contribute to the effectiveness of the principal article (e.g., facilitate the use or handling of the principal article, widen the range of its uses, or improve its operation.) *See,* HRL 087704 dated September 27, 1990, and HRL 951857.

As stated in HRL 085088, it is our opinion that disposable intravenous solution administration sets which serve as a conduit through which blood flows between the patient and the machine are medical instruments or appliances in and of themselves and, therefore, are classified under subheading 9018.90.80, HTSUS. Generally, they are not classified as accessories of the pumps. However, in this case the "Accuset" and "Gemini" sets, by their design do appear to facilitate the use of the pumps. Features such as the cassette in the "Accuset" set and the silicon tubing and "Flo-Stop" slide clamp of the "Gemini" set, help regulate the rate and flow of liquid passing through the pump. Therefore, they are also viewed as accessories to the pumps.

In this situation, where the "Accuset" and "Gemini" sets are classifiable as medical instruments and apparatus and as accessories of pumps, Note 2, Chapter 90, HTSUS, states that:

> * * * parts and accessories for machines, apparatus, instruments or articles of this chapter are to be classified according to the following rules:
>
> (a) Parts and accessories which are goods included in any of the headings of this chapter or of chapter 84, 85 or 91 (other than heading 8485, 8548 or 9033) are in all cases to be classified in their respective headings;
>
> (b) Other parts and accessories, if suitable for use solely or principally with a particular kind of machine, instrument or apparatus, or with a number of machines, instruments or apparatus of the same heading (including a machine, instrument or apparatus of heading 9010, 9013 or 9031) are to be classified with the machines, instruments or apparatus of that kind * * *.

Therefore, pursuant to Note 2(a), Chapter 90, HTSUS, as the "Accuset" and "Gemini" sets are classifiable as medical instruments and apparatus in heading 9018, HTSUS, they must be so classified, regardless of whether they are also classifiable as accessories of pumps. Pursuant to Note 2(a), Chapter 90, HTSUS, the "Accuset" and "Gemini" sets are classified under subheading 9018.90.80, HTSUS, as other medical instruments and appliances.

Holding:

The "Accuset" and "Gemini" intravenous solution administration sets are classified under subheading 9018.90.80, HTSUS, as other medical instruments and appliances. Articles classified under this tariff provision are dutiable at the Column 1 rate of 6.3% *ad valorem*.

NY 895684 is modified as set forth above.

JOHN DURANT,
Director,
Commercial Rulings Division.

U.S. Court of Appeals for the Federal Circuit

NOTE: Attachments A and B to Appeal No. 93–1354 have been omitted. Interested parties are requested to contact the Court for additional information.

TEXACO MARINE SERVICES, INC. AND TEXACO REFINING AND MARKETING, INC., PLAINTIFFS-APPELLANTS *v.* UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 93–1354

(Decided December 29, 1995)

Sharon Steele Doyle and *Robert T. Givens*, Givens & Kelly, of Houston, Texas, argued for plaintiffs-appellants.

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Appealed from: U.S. Court of International Trade.
Judge TSOUCALAS.

Before RICH, MAYER, and SCHALL, *Circuit Judges*.

SCHALL, *Circuit Judge*.

Texaco Marine Services, Inc. (TMSI) and Texaco Refining and Marketing, Inc. (TRMI) (collectively "Texaco") appeal from the March 10, 1993 judgment of the United States Court of International Trade, *Texaco Marine Servs., Inc. v United States*, 815 F. Supp 1484, which denied Texaco's motion for summary judgment, granted the government's cross-motion for summary judgment, and dismissed Texaco's action. In the opinion supporting its judgment, the Court of International Trade determined that certain expenses for cleaning, wrapping heating coils, and blanking cargo lines upon a United States-flagged vessel by a foreign crew were integral to foreign repairs subject to the fifty percent *ad valorem* duty of the vessel repair statute, 19 U.S.C. § 1466 (1988),

because the expenses would not have been necessary but for the repairs. *Id.* at 1486. Based upon that determination, the court held that the expenses were "expenses of repairs" within the meaning of the vessel repair statute and therefore subject to the *ad valorem* duty. We affirm.

BACKGROUND

I. THE VESSEL REPAIR STATUTE

The vessel repair statute, first enacted in 1866, imposes a fifty percent duty on the value of "expenses of repairs" made in a foreign country upon United States-flagged vessels. The statute, in subsection (a), provides in pertinent part:

> **(a) Vessels subject to duty; penalties**
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> The equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade, or a vessel intended to be employed in such trade, shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an *ad valorem* duty of 50 per centum on the cost thereof in such foreign country.

19 U.S.C. § 1466(a) (1988). If expenses incurred in a foreign port are not "expenses of repairs" within the meaning of the statute, the expenses are not subject to the vessel repair duty. That is the case, for example, where the expenses are for routine cleaning of the vessel. *See, e.g., Northern Steamship Co. v. United States*, 54 Cust. Ct. 92, 96–98 (1965) (finding that certain expenses were for routine cleaning and not for repair or restoration of the vessel because of deterioration and damage, and therefore holding that such expenses were not subject to the vessel repair duty).[1]

II. FACTS OF THE CASE

The subject vessel, the S.S. TEXACO GEORGIA (the GEORGIA), is an oil tanker registered under the laws of the United States. The GEORGIA is owned by TRMI and managed by TMSI. Commencing on June 16, 1987, and continuing until July 18, 1987, certain services and repairs were performed on the GEORGIA by foreign labor at the Hellenic Shipyards Co. (Hellenic) in Athens, Greece. Following the repairs, the GEORGIA returned to the United States, arriving in Port Arthur, Texas, on August 11, 1987. Upon arrival, TMSI declared and entered with the United States Customs Service (Customs) the expenses that were incurred for services and repairs performed on the GEORGIA in

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[1] *Northern Steamship* is a decision of the United States Customs Court. In 1980, Congress expanded the jurisdiction and powers of the Customs Court and, to more accurately describe the court's clarified and expanded jurisdiction and its new judicial functions relating to international trade, changed the court's name to the United States Court of International Trade. Customs Courts Act of 1980, Pub. L. No. 96–417, 94 Stat. 1727 (1980); H.R. Rep. No. 1235, 96th Cong., 2d Sess. 20 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3731–32.

Greece (entry no. C21–0000060–6), as is required under 19 C.F.R. § 4.14(b).[2]

Four of the numerous itemized expenses in the entry are at issue in this appeal. Three of the four expenses were for cleaning performed subsequent to dutiable repairs. The fourth was for work associated with protective coverings used during dutiable repairs. The facts regarding the four expenses at issue—as set forth in uncontested documents, in an affidavit of Neal McPhee in support of Texaco's summary judgment motion, and in Texaco's appeal briefs—are as follows:

1. *Clean-up following boiler room repairs:* The first cleaning task is described in item B–27 of Hellenic's invoice to TMSI. Invoice item B–27 states: "After boiler repairs and other repairs are completed in the boiler room areas, furnish necessary facilities, materials and labour to clean completely all debris and accumulated soot in the upper and lower fire room * * *." Texaco did not dispute the dutiability of the expenses of repairs in the boiler room area. Neither did it dispute that at least some of the cleaned-up debris (e.g., soot, old brickwork, old insulation, casing sealer, and rust) was generated by the actual making of the repairs. Texaco argued, however, that a portion of the debris referred to in B–27 was not dutiable because it was trash (e.g., soft drink cans and plastic bags) left behind by the workers who performed the repairs in the boiler room area and therefore did not result from repair work itself.

2. *Clean-up following cargo tank repairs:* The second cleaning task is described in item G–2(g) of the invoice as follows: "All tanks cleaned by removal or grits, debris, etc. and left ready for cargo loading[,] also exposed decks and deck machineries cleaned." More specifically, the item G–2(g) cleaning involved "sweeping and mopping inside the tanks and sweeping, mopping, shoveling, hosing down outside the tanks, and the removal and transport of debris off of the vessel." The item G–2(g) cleaning work followed the grit-blasting and coating of fifteen of the GEORGIA's cargo tanks. The work did not involve the tanks that were grit-blasted and coated, however. Rather, it involved cleaning tanks that were left exposed to air-borne particles from the tanks that were being grit-blasted. After the cargo tanks were cleaned, they were used to transport lubricating oils. Texaco disputes the dutiability of the expenses from cleaning tanks that were not grit-blasted and coated.

3. *Clean-un following "after peak" tank repairs:* The third cleaning task is described in invoice item H–29(f) as follows: "Removed all debris and sediment from After Peak, leaving ready for filling." The "after peak" tank is the extreme rear compartment in a vessel's hold where the ship narrows toward the sternpost. The cleaning of the after peak tank followed repair work on the tank. When the clean-up was finished, the

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[2] A vessel owner is required, upon first arrival of the vessel in the United States, to declare to Customs all repairs made outside the United States, regardless of the dutiable status of the repairs. 19 C.F.R. § 4.14(b)(1) (1994). The vessel owner also must file an entry of the repairs with Customs. *Id.* § 4.14(b)(2). As part of the entry process, the vessel owner is required to estimate the duties owed and, in most cases, deposit the estimatet amount of duties with Customs. *Id.* § 4.14(b)(1). The procedures set forth in the present regulation are the same in substance a£ the procedures in effect when the entries of this case were made. *See* 19 C.F.R. § 4.14 (1987).

tank was filled with fresh, distilled water. Texaco did not dispute the dutiability of the expenses of the repair work, and did not dispute that at least some of the cleaned-up debris (e.g., rust, scale, slack, air-borne materials) was generated by the repairs. As with the clean-up following repairs in the boiler room area however, Texaco contended that expenses related to cleaning up debris left behind by the workers who performed the repairs were not dutiable.

4. *Protective coverings used during cargo tank repairs:* The last expense related to protective coverings used in conjunction with the grit-blasting and coating repairs described above. The work relating to the protective coverings is described in item G–2(f) as follows: "Protected heating coils by wrapping in place, total 2661 meters and cargo lines blanked as necessary in way of removals." The heating coils were wrapped to prevent work crews from inadvertently coming in contact with the coils and damaging them. The blanking of the cargo lines involved covering the openings for the lines in the fifteen tanks that were grit-blasted and coated. The lines had to be blanked in order to prevent dirt and air-borne particles from entering them. Texaco contends that it did not request that the work set forth in invoice item G–2(f) be performed, although it is undisputed that Hellenic was paid for performing the work.

Customs concluded that the above-described expenses were dutiable as "expenses of repairs" within the meaning of the vessel repair statute. Thus, when Customs liquidated the GEORGIA's vessel repair entry and assessed duties in the amount of $294,846.38, the assessment included: (1) $17,454.50, as duties and interest on the cleaning expenses described above; and (2) $10,459.50, as duties and interest on the expenses associated with protective covering described above. After the full amount of assessed duties was paid, Texaco filed a protest, arguing that the cleaning and protective covering expenses were not "expenses of repairs" within the meaning of the vessel repair statute. In due course, Customs denied the protest, whereupon Texaco filed suit in the Court of International Trade.

III. Proceedings in the Court of International Trade

In its motion for summary judgment pursuant to Rule 56(c), Ct. Int'l Trade R., Texaco argued that duties should not have been assessed on the cleaning expenses or on the expenses associated with protective coverings because those expenses were not "expenses of repairs" within the meaning of § 1466(a). In cross-moving for summary judgment, the government countered that the subject expenses were "expenses of repairs" within the meaning of § 1466(a) in that they were "integral to" and "necessary for" the dutiable repairs. In other words, the government argued, the expenses would not have been necessary "but for" the dutiable repairs. The Court of International Trade agreed with the government.

First, with respect to the cleaning expenses, the court determined that "had it not been for the repairs on the Texaco Georgia, the cleaning

would not have been necessary." 815 F. Supp. at 1486. Then, it concluded that where cleaning services are an "integral" or a "necessary" part of dutiable repairs, then the cleaning itself is dutiable as coming within the meaning of the vessel repair statute's "expenses of repairs." 815 F. Supp at 1486. Accordingly, the court held that the cleaning expenses at issue were dutiable. *Id.* With respect to the expenses associated with protective coverings used during dutiable repairs, the court determined that these expenses, like the cleaning expenses, were integral to the repair process and would not have been necessary but for the repairs. *Id.* From that, the court held that the expenses associated with protective covering work were also dutiable. Id at 1486–87.

DISCUSSION

I. STANDARD OF REVIEW

Summary judgment is proper in the Court of International Trade where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ct. Int'l Trade R. 56(c). This is the same standard as is set forth in Rule 56(c) of the Federal Rules of Civil Procedure. This court reviews a grant of summary judgment by the Court of International Trade "for correctness as a matter of law, deciding *de novo* the proper interpretation of the governing statute and regulations as well as whether genuine issues of material fact exist." *St. Paul Fire & Marine Ins. Co. v. United States,* 6 F.3d 763, 767 (Fed. Cir. 1993).

II. CONTENTIONS OF THE PARTIES

Texaco contends that the Court of International Trade erred in treating clean-up expenses and protective covering expenses as "expenses of repairs" within the meaning of § 1466(a). According to Texaco, such treatment is contrary to the vessel repair statute and also inconsistent with prior judicial constructions of "expenses of repairs." Further, Texaco contends that Custom's assessment of the fifty percent *ad valorem* duty on the expenses at issue was improper, in that Customs impermissibly expanded its interpretation of the phrase "expenses of repairs" without the requisite notice being given to the trade through notice in the Federal Register. The government maintains that the Court of International Trade properly interpreted the phrase "expenses of repairs" in holding that the expenses for cleaning and protective covering work were dutiable under the statute. The government also maintains that there was no established and uniform practice that the expenses were non-dutiable, so as to require notice to the public of a change in administrative practice.

For the reasons set forth below, we hold that the imposition of the fifty percent *ad valorem* duty upon the expenses at issue in this case was consistent with the vessel repair statute and not contrary to any established and uniform practice of Customs.

III. ANALYSIS

A

As already noted, the imposition of a fifty percent *ad valorem* duty on foreign expenses of repairs on United States-flagged vessels dates back to the original enactment of the vessel repair statute in 1866. Act of July 18, 1866, ch. 201, § 23, 14 Stat. 178, 183. The "expenses of repairs" phrase has remained unchanged during the statute's 130-year history, and is in the current version of the statute codified at 19 U.S.C. § 1466(a). The statute has never specifically defined the scope of the phrase "expenses of repairs."

Our interpretation of the statute begins with the language employed by Congress. *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1579 (Fed. Cir. 1990) (citing *Mallard v. United States Dist. Ct. for S. Dist. of Iowa*, 490 U.S. 296, 300–01 (1989)), *cert. denied*, 499 U.S. 922 (1991). The language with which we are concerned provides that the vessel repair duty is to be assessed upon "[t]he equipments, or any part thereof * * * purchased for, or the repair parts or materials to be used, or the *expenses of repairs* made in a foreign country upon a vessel documented under the laws of the United States * * *." 19 U.S.C. § 1466(a) (1988) (emphasis added). This language is qualified only by the several specific exceptions that appear in subsections (a) and in subsections (d)–(f) of § 1466; Texaco does not allege that any of these exceptions apply in the present case.

Texaco urges us to reject the Court of International Trade's "but for" approach and to interpret "expenses of repairs" so as to exclude those expenses (e.g., expenses for clean-up and protective covering work) not incurred for work directly involved in the actual making of repairs. Such a reading has no basis in the plain language of the statute, however. Aside from the inapplicable statutory exceptions, the language "expenses of repairs" is broad and unqualified. As such, we interpret "expenses of repairs" as covering all expenses (not specifically excepted in the statute) which, but for dutiable repair work, would not have neen incurred. Conversely, "expenses of repairs" does not cover expenses that would have been incurred even without the occurrence of dutiable repair work. As will be more clearly illustrated below when we address the specific expenses at issue in this case, the "but for" interpretation accords with what is commonly understood to be an expense of a repair. *See E.M. Chems. v. United States*, 920 F.2d 910, 913, 9 Fed. Cir. (T) 33, 37 (1990) ("[T]ariff terms are to be construed in accordance with their common and popular meaning, in the absence of a contrary legislative intent."); *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789, 6 Fed. Cir. (T) 121, 125 ("In the absence of evidence to the contrary * * * '[t]he meaning of a tariff term is presumed to be the same as its common or dictionary meaning.'" (quoting *Rohm & Haas Co. v. United States*, 727 F.2d 1095, 1097, 2 Fed. Cir. (T) 28, 29 (1984))), *cert. denied*, 488 U.S. 943 (1988).

To interpret the statute any more restrictively would thwart the broad, general language which we presume was deliberately used by Congress. *Canadian Aviator, Ltd. v. United States,* 324 U.S. 215, 222–26 (1945) (refusing to interpret an Act authorizing suits against the United States as narrowly as the government suggested, because "we think Congressional adoption of broad statutory language authorizing suit was deliberate and is not to be thwarted by an unduly restrictive interpretation"). That the language is broad and general in nature does not mean it is ambiguous. To the contrary, the meaning is quite clear—the broad, general language means that its application is broad in scope. Absent the impossible task of having Congress list in the statute every type of repair expense that it intended be encompassed within the statute, the statute could not be any clearer on its face. Hence, this is not a case like *United States v. Marsching,* 1 Ct. Cust. 216, 217–20 (Ct. Cust. App. 1911), or *United States v. Wigglesworth,* 28 F. Cas. 595, 596–97 (C.C.D. Mass. 1842) (No. 16,690), or *Eidman v. Martinez,* 184 U.S. 578, 590–91 (1902), cited by Texaco, where the statutory language was unclear or where an attempt was made to have read into it words which were not there.

Further, the broad "but for" interpretation does not thwart the purposes behind the vessel repair statute. *Cf. United States v. Carbone,* 327 U.S. 633, 637 (1946) (interpreting the Kickback Act more narrowly than its broad literal language "in light of the evils which gave rise to the statute and the aims which the proponents sought to achieve"). To the contrary, the interpretation effectuates the obvious purpose for which Congress enacted the statute.[3] As was stated by one of our predecessor courts, the statute was enacted "to equalize, by imposition of the prescribed duty, the relative costs of repairs performed by foreign versus domestic labor, in order to encourage U.S. ship owners to employ U.S. labor whenever possible." *Mount Washington Tanker Co. v. United States,* 665 F.2d 340, 344 (CCPA 1981); *see also South Corp. v. United States,* 690 F.2d 1368, 1372, 1 Fed. Cir. (T) 1, 5 (1982) ("In enacting § 1466 (a) Congress sought to protect and encourage American ship repair facilities."); *Sea-Land Serv., Inc. v. United States,* 683 F. Supp. 1404, 1409 (Ct. Int'l Trade 1988) ("It is evident from the legislative history of 19 U.S.C. § 1466, a revision of section 466 of the Tariff Act of 1930, that the basic purpose of the foreign repair statute was to protect American labor."); *Erie Navigation Co. v. United States,* 475 F. Supp. 160, 163 (Cust. Ct. 1979) ("It is clear that the purpose of section 1466(a) was to protect the American shipbuilding and repairing industry."); *United States v. Gissel,* 353 F. Supp. 768, 772 (S.D Tex. 1973) (noting that "it was Congressional policy to encourage the obtaining of American flag vessel repairs in American shipyards"), *aff'd,* 493 F.2d 27 (5th Cir.), *cert. denied,* 419 U.S. 1012 (1974). If the repairs involved had been made in a domestic instead of a foreign port, the additional work that the

[3] Other than the words of the statute that Congress enacted in 1866, we know of no statement made by the 1866 Congress which sheds light upon the purpose behind the statute.

Court of International Trade held was subject to the fifty percent duty on "expenses of repairs" would have been done by American rather than foreign workers. Therefore, subjecting the expenses of that additional work to the fifty percent duty furthers the purpose of the statute.

B

Texaco relies heavily upon *United States v. George Hall Coal Co.*, 142 F. 1039 (2d Cir. 1906), in support of its argument that the courts have firmly established that "expenses of repairs" means something more restrictive than the "but for" interpretation warranted by the statute's plain language. Texaco's reliance upon *George Hall Coal* is misplaced. In that case, the United States Court of Appeals for the Second Circuit affirmed a December 31, 1903 unpublished decision of the Department of Treasury Board of General Appraisers (Board).[4] The Board had sustained a protest made by George Hall Coal and had overruled an assessment of the vessel repair duty levied on the expense of dry-docking a vessel while the vessel was undergoing dutiable repairs in a foreign port. 142 F. at 1039. Significantly, what is not apparent from any of the published decisions in *George Hall Coal* is the rationale upon which it was determined that the dry-docking expense was not an expense of repair.[5] The rationale was provided, however, in the Board's unpublished decision. There, the Board stated that the dry-docking issue was settled in an earlier unpublished Board decision, rendered on September 13, 1903, in another protest made by George Hall Coal. In the September 13, 1903 decision, the Board reasoned:

> The mere drawing up of a vessel on a dry dock is not a part of her repairs, but is rather a method of making an inspection of her to determine whether any repairs are necessary. The examination might show the hull to be in perfect condition, requiring no attention of any kind

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[4] The no-longer-existent Board of General Appraisers was an administrative unit within the Department of the Treasury. *See* Act of June 10, 1890, ch. 407, § 12, 26 Stat. 131, 136. The Board was responsible for the review of decisions by Customs officials. *Id.* §§ 12–14, 26 Stat. at 136–38. In 1926, as the types of decisions pertaining to import transactions expanded, Congress established the United States Customs Court, as an Article I court, to replace the outmoded Board. Pub. L. No. 69–307, 44 Stat. 669 (1926); *see also* H.R. Rep. No. 1235, at 18, 1980 U.S.C.C.A.N. at 3729–30. The Customs Court gradually became an integral part of the federal judicial system, and in 1956 Congress declared the Customs Court an Article III court. Pub. L. No. 84–703, 70 Stat. 532 (1956); *see also* H.R. Rep. No. 1235, at 18, 1980 U.S.C.C.A.N at 3730. As discussed earlier in this opinion, the Customs Court is the predecessor to the present-day Court of International Trade.

At the time of *George Hall Coal*, review of Board decisions could be had in the nisi prius federal circuit courts, Act of June 10, 1890, ch. 407, § 15, 26 Stat. at 138, and then in the courts of appeals, Act of March 3, 1891, ch. 517, § 6, 26 Stat. 826, 828. In 1909, however, exclusive jurisdiction over Board decisions was vested in the newly created Court of Customs Appeals. Tariff Act of 1909, ch. 6, § 28, 36 Stat. 11, 106 (amending Act of June 10, 1890). Then, in 1929, the Court of Customs Appeals' jurisdiction was expanded and its name was changed to the Court of Customs and Patent Appeals (CCPA), Pub. L. No. 70–914, 45 Stat. 1475, 1475–76 (1929). The CCPA was one of our predecessor courts.

[5] There are three published opinions in *George Hall Coal*. The first is an opinion of the Treasury Department, Treas. Dec. 24932 (Jan. 25, 1904), in which the Department opined that a protest did not lie in cases arising under the vessel repair statute and that therefore the Board was without jurisdiction to review Customs' assessment of a vessel repair duty. *Id.* The Department thus authorized a government appeal of the Board's decision. *Id.* On appeal, the nisi prius United States Circuit Court for the Western District of New York rejected the government's jurisdictional contention, thereby sustaining the decision of the Board. *United States v. George Hall Coal Co.*, 134 F. 1003 (1905), *aff'd*, 142 F. 1039 (2d Cir. 1906). That the Board lacked jurisdiction was the government's sole argument to the circuit court; in other words, the government did not argue that the drydocking expenses were in fact dutiable under the vessel repair statute. *See id.* The Board's decision was then upheld by the Second Circuit, which also rejected the government's jurisdictional argument. *United States v. George Hall Coal Co.*, 142 F. 1039 (1906). Again, ithe merits of the duty assessment were not before the court. *See id.*

Copy of Board decision attached to Letter from George Hall Coal Co. to Collector of Customs, Charlotte, N.Y., the letter being dated September 18, 1903.[6] In other words, the Board held that the dry-docking expense was not subject to the vessel repair duty because the Board found that the expense would have been incurred irrespective of whether or not dutiable repairs were performed. Therefore, *George Hall Coal* is entirely consistent with the "but for" interpretation of the Statute.

C

To the extent that judicial authority not binding upon this court is inconsistent with the "but for" interpretation we clarify today, we are not persuaded thereby to interpret "expenses of repairs" any more restrictively than the plain language of the statute warrants. We note first *American Viking Corp. v. United States,* 150 F. Supp. 746 (Cust. Ct. 1956), wherein the court held that the expense of providing lighting needed to perform a dutiable repair was not dutiable as an expense of the repair. *Id.* at 752. The lighting expense at issue in *American Viking* seemingly would have been an expense of the repair under a "but for" interpretation of the statute. The *American Viking* court, however, read the statute more restrictively, based upon *George Hall Coal*. The *American Viking* court relied upon *George Hall Coal* in holding that "[s]ince the cost of a place to do the work is not dutiable as expenses of repairs, neither is the cost for lighting necessary for its performance." 150 F. Supp. at 752. As discussed above, though, *George Hall Coal* does not stand for the proposition that the cost of a place to do the work is not dutiable as expenses of repairs. *George Hall Coal* simply stands for the proposition that expenses that would have been incurred irrespective of whether or not dutiable repairs are performed are not dutiable as an expense of repairs. We therefore decline to place any reliance upon *American Viking.*

We also are not persuaded by either *International Navigation Co. v. United States,* 148 F. Supp. 448 (Cust. Ct. 1957), or *Mount Washington Tanker Co. v. United States,* 505 F. Supp. 209 (Ct. Int'l Trade 1980). The holdings in these cases are based upon the same mistaken premise as the holding in *American Viking.* In *International Navigation,* the United States Customs Court held that certain expenses—including expenses to transport a foreign repair crew to and from an anchored vessel being repaired, which expenses the court specifically found were "necessary to perform the work"—were not dutiable as expenses of repairs. 148 F Supp. at 455. Again, the expenses at issue in *International Navigation* seemingly would have been viewed as coming within the purview of the

[6] The December 31, 1903 unpublished Board decision and the September 13, 1903 unpublished Board decision (as an attachment to the September 18, 1903 George Hall Coal Co. letter) are annexed hereto as Attachments A and B, respectively.

Our discussion of these two unpublished decisions is necessitated by (i) the fact that the published opinion of the Second Circuit in *George Hall Coal* affirmed the Board's December 31, 1903 unpublished decision and (ii) by the fact that, as seen below, subsequent decisions of the Court of International Trade and its predecessor, the Customs Court, have viewed *George Hall Coal* as standing for the proposition that the cost of a place to do work (i.e., a drydock) is not dutiable as an expense of repairs, which in fact it does not. Under these circumstances, our discussion of *George Hall Coal* should not be viewed as a departure from the spirit of Federal Circuit Rule 47.6(b), which states that opinions of this court which are designated as not citable "shall not ne employed or cited as precedent."

statute had the court given the statute a "but for" interpretation. The *International Navigation* court, however, analogized the expenses to dry-docking expenses and held that the expenses were not subject to duty. *Id.* Thus, the court stated that in *George Hall Coal* "[e]ven though the vessel had to be placed in drydock in order to be repaired, the expenses therefor were not considered part of the actual repairs." *Id.* As discussed above though, the Board determined in *George Hall Coal* that the dry-docking expenses were not dutiable because they would have been incurred irrespective of whether or not dutiable repairs were performed, not because the expenses were necessary for the repairs.

In *Mount Washington Tanker,* the Court of International Trade held that certain expenses—namely, compensating the members of a Swedish repair crew for their time spent traveling between Sweden and a vessel anchored at sea off of Singapore—were not dutiable as an expense of the dutiable repairs performed by the repair crew. 505 F. Supp. at 216.[7] The *Mount Washington Tanker* court relied upon International Navigation, and also mentioned *George Hall Coal,* and held that expenses "not directly involved in the making of repairs," although "incident to the repairs," are not dutiable as expenses of repairs. *Id.* Seemingly, these expenses too would have been viewed as coming within the statute if the court had used a "but for" approach. Thus, *Mount Washington Tanker,* like *American Viking* and *International Navigation*, was incorrectly decided.

D

We turn next to Texaco's argument that Customs's assessment of duties on the expenses at issue in this case was improper because it was based upon an interpretation of "expenses of repairs" that was a change in established and uniform practice. Texaco contends that Customs made the change without the required notice in the Federal Register. Texaco's argument is premised upon the notice requirement regarding departures from "established and uniform practice" which appears in 19 U.S.C. § 1315(d). Section 1315 provides in pertinent part:

> **(d) Effective date of administrative rulings resulting in higher rates**
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> No administrative ruling resulting in the imposition of a higher rate of duty or charge than the Secretary of the Treasury shall find to have been applicable to imported merchandise under an established and uniform practice shall be effective with respect to articles entered for consumption or withdrawn from warehouse for consumption prior to the expiration of thirty days after the date of publication in the Federal Register of notice of such ruling * * *.

19 U.S.C. § 1315(d) (1988).[8] The government does not contest the applicability of the § 1315(d) notice requirement to a ruling such as that in

[7] Part of the decision in this case was appealed by Mount Washington Tanker Company to the CCPA, where the decision was affirmed. *Mount Washington Tanker,* 665 F.2d 340 (1980). However, the issue in the Court of International Trade decision with which we are concerned is not addressed in the decision of the CCPA; thus, an appeal from the decision of the Court of International Trade apparently was not taken by the government.

[8] Subsection (d) was not affected by the 1993 amendments to § 1315. *See* Pub. L. No. 103-182, tit. VI, § 633, 107 Stat. 2198.

the present case. We note in this regard that 19 U.S.C. § 1498(a)(10) (1988)—which provides that "[t]he Secretary of the Treasury is authorized to prescribe rules and regulations for the declaration and entry of * * * [m]erchandise within the [Vessel repair statute] (relating to * * * repairs * * *)"—indicates an intention by the Congress that expenses within the vessel repair statute shall be regarded as merchandise imported into the United States. *International Navigation,* 148 F. Supp at 453; *Pacific Transp. Lines, Inc. v. United States,* 29 Cust. Ct. 21, 27 (1952).

Texaco asserts that Treasury Decision (T.D.) 39443, 43 Treas. Dec. 99 (1923), established an interpretation of "expenses of repairs" with which Customs' assessment of duties in the present case is inconsistent. Specifically, Texaco contends that in T.D. 39443 the Treasury Department interpreted "expenses of repairs" as covering only those expenses incurred for work directly involved in the actual making of repairs. Texaco argues that under this standard the cleaning expenses and the expenses associated with the protective covering work, that are at issue in this case, are not "expenses of repairs" within the meaning of the statute.

We do not agree that T.D. 39443 established the narrow standard for "expenses of repairs" that Texaco asserts it did. In fact, T.D. 39443 established nothing with respect to the interpretation of "expenses of repairs." At issue in T.D. 39443 was the dutiability under the vessel repair statute of the following expenses: (1) overtime pay for the *domestic* crew of a United States flagged vessel; and (2) the cost of *domestically manufactured* repair materials. 43 Treas. Dec. at 100. The Treasury Department ruled that neither expense was subject to the vessel repair duty. *Id.* The Department held, therefore, "that the words 'expenses of repairs made in a foreign country' as used in [the vessel repair statute] apply only to expenditures made for foreign materials or for foreign labor employed in making repairs." *Id.* This holding was subsequently adopted by Congress, Tariff Act of 1930, Pub. L. No. 71–361, tit. IV, § 466, 46 Stat. 590, 719, and remains in the current version of the statute, which provides that "compensation paid to members of the regular crew of such vessel in connection with * * * the making of repairs, in a foreign country, shall not be included in the cost * * * of such repairs." 19 U.S.C. § 1466(a).

Texaco, however, has seized upon the words "employed in making repairs" used by the Department in T.D. 39443 to argue that the decision established that only those expenses incurred in the actual making of repairs are dutiable. Texaco's reliance upon this language is misplaced. T.D. 39443 does not define the scope of the phrase "employed in making repairs". In other words, the phrase "employed in making repairs" used in the Treasury Department ruling is no less broad than the phrase "expenses of repairs" appearing in the statute. Moreover, the interpretation of the statutory language "expenses of repairs" was not at issue in T.D. 39443 and thus the decision should not be seen as an inter-

pretation of that statutory language. Again, the issue in T.D. 39443 was not the type of work performed and its nexus with the underlying dutiable repair; rather, the issue was *who* performed the work—foreign or domestic labor. Thus, T.D. 39443 did not establish the restrictive interpretation of "expenses of repairs" that Texaco contends it did.

Accordingly, we hold that the Court of International Trade properly used a "but for" standard for "expenses of repairs" when it evaluated the expenses at issue in this case. Using that standard, we turn now to the expenses at issue to determine whether they were properly assessed with the vessel repair duty.

E

1. *Clean-up Expenses:*

It is undisputed that "but for" dutiable repairs, the clean-up work, at least in part, would not have been required. As for the clean-up work of invoice item B–27, all the debris removed either resulted from the boiler repairs or was trash left behind by workers making the repairs. Similarly, the item G–2(g) clean-up work was necessitated by debris created by the grit-blasting-and-coating repair operation.[9] Finally, as for item H–29(f) clean-up work, the debris removed was either created by the actual repairs or was trash left behind by workers making the repairs.[10] Accordingly, all of the clean-up expenses at issue come within the statute under a "but for" interpretation.

Under the common meaning of "expenses of repairs," it is plain that the clean-up expenses in this case must be considered to be expenses of the repairs that were made on the GEORGIA. A good analogy is the repair of an automobile We doubt very much that a person who leaves an automobile at a repair shop for repairs considers the repair job complete if the car is returned with debris from the repair work and trash from the workers strewn about the interior of the vehicle. Such is the nature of the clean-up expenses in this case; therefore, they must be considered "expenses of repairs."

Texaco argues, though, that Customs's assessment of duties on clean-up expenses was a change in established and uniform practice. Texaco relies upon two rulings published in the CUSTOMS BULLETIN in support of its argument. Concededly, one of the rulings, Customs Service Decision (CSD) 80–148, 14 Cust. B. 968 (1980), does support Texaco's argument for holding clean-up expenses to be nondutiable. The services performed by foreign labor in CSD 80–148 involved cleaning the dock area beside a vessel in order to remove "the vessel's rubbish, empty drums, cables, steel, wire, etc." *Id.* at 968. It appears that these items were what remained after the following dutiable repairs: (1) the

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[9] Although it appears that some cleaning of the cargo tanks to prepare them to carry cargo would have been necessary even if the repairs had not been made, it also is true that all the debris mentioned in the invoice was created by the repairs. In this regard, the invoice does not indicate that the cleaning included the cleaning of the remains of previous cargo. In any event, Texaco has made no effort to separate from the total G–2(g) expenses amounts that would have been incurred to clean the cargo tanks as a normal maintenance service had the G–2 repairs not been made.

[10] Texaco does not contend that the cleaning of the after peak tank would have been necessary even if the repair work had not been performed. In addition, no effort has been made to separate from the total H–29(f) expenses those expenses that would have been incurred to clean the after peak tank as part of normal maintenance.

installation of a new drive shaft in a winch unit that had failed; (2) the changing of powerpacks on the port and starboard engines; and (3) the installation of a port tow cable. *Id.* Customs ruled that "[t]he cost of cleaning the quay in which a vessel was berthed during the time that repairs were effected to it are not classifiable as repairs under the vessel repair statute * * *." *Id.* at 969–70. The ruling was based upon a prior unpublished Customs Ruling, Customs Information Exchange (CIE) 18/48 (Jan. 12, 1948), in which "it was held that cleaning which is not preparatory to the making of dutiable repairs is not dutiable under the vessel repair statute." 14 Cust. B. at 969. Customs stated in CSD 80–148 that it was "of the opinion that the cleaning charges [at issue] were not part of the costs of repairs effected to the vessel" and that the charges were "analogous to drydocking charges which were also held to be duty free in CIE 18/48." *Id.*

We cannot say, however, that CSD 80–148 demonstrates a uniform and established Customs practice that all clean-up expenses are non-dutiable. Our review of various unpublished Customs decisions submitted by the parties has revealed that Customs historically has used a broader scope of "expenses of repairs" than is suggested by the ruling in CSD 80–148. Generally, although the specific formulations differ somewhat in form, Customs has analyzed whether an activity is subject to the vessel repair duty by evaluating whether there was a nexus between the underlying dutiable repair work and the expenses at issue. *See, e.g.*, CIE 429/61, at 2 (Apr. 28, 1961) ("[I]tem 4 which pertains to the main steam strainer is purely a cleaning operation which *is not related in any manner* to repairs and is therefore not subject to the [vessel repair duty]." (emphasis added)); CIE 820/60, at 1 (June 9, 1960) ("Cleaning operations actually in preparation for painting are dutiable on the cost thereof as an *integral part* of painting * * *." (emphasis added)); Customs Service Headquarters Ruling 108112 EA, at 3 (Aug. 21, 1986) ("Cleaning is not a dutiable expense unless *associated with* a repair process." (emphasis added)); Customs Service Headquarters Ruling 101423 BJF, at 3 (Oct. 20, 1976) ("Essentially, if [testing, inspection and cleaning expenses] are *incident to or accompany* repairs, they will be held dutiable; if *conducted without regard to* repairs, they are not dutiable." (emphasis added)).

The other ruling upon which Texaco relies, CSD 81–188, 15 Cust. B. 1103 (1981), also is not helpful to it. In that ruling, Customs held that "charges for the cleaning of cargo tanks of an American-flag vessel in a foreign drydock are dutiable under [the vessel repair statute] when dutiable repairs on the tanks are made following the cleaning." *Id.* at 1104. From this holding, Texaco argues that only pre-repair cleaning expenses are dutiable and thus post-repair cleaning expenses are never dutiable. We do not accept this leap in logic, especially in light of the "but for" standard for "expenses of repairs" clarified above.

In sum, the non-dutiability of clean-up expenses was not an established and uniform practice of Customs.

For the foregoing reasons, we affirm the imposition of the vessel repair duty on the clean-up expenses identified by invoice items B–27, G–2(g), and H–29(f).

2. *Expenses Associated with Protective Covering Work:*

As with the clean-up expenses, it is undisputed that "but for" dutiable repairs, the expenses associated with the protective coverings, set forth in invoice item G–2(f), would not have been incurred. As we have seen, the heating coils were wrapped to prevent the crew performing the grit-blasting-and-coating repairs from coming in contact with and damaging the coils. The cargo lines were covered (i.e., "blanked") to prevent airborne materials—presumably created by the grit-blasting operation—from entering the openings of the lines and getting the lines dirty. Texaco does not contend that the coils would have been wrapped or that the cargo lines would have been "blanked" even if the dutiable repairs had not been performed. Accordingly, the protective covering expenses at issue come within the vessel repair statute under a "but for" interpretation.[11]

The work effort associated with the protective coverings can be analogized to the labor-intensive effort involved in applying masking tape over areas not to be painted, as a part of an interior house-painting job. The masking tape contributes to a better and more effective paint job and to improving the appearance of the house. Indeed, the masking tape might easily be considered to be as essential to the accomplishment of the paint job as the painting itself. Certainly, the application of the masking tape would be considered a part of the paint job. Similarly, in the present case, the labor to wrap the heating coils and to cover the openings of the cargo lines, which was performed in the cargo tanks, must be considered to be part of the repairs effected to those tanks, and the expenses therefor must be considered as dutiable within the meaning of the statute.

Finally, Texaco argues that the imposition of the vessel repair duty upon the expenses associated with the protective coverings is inconsistent with CSD 83–18, 17 Cust. B. 752 (1982). We disagree. In CSD 83–18, Customs ruled that the expense of stack covers used to protect a vessel's boilers and engine room from rain and snow while the vessel was in port were non-dutiable. The ruling is irrelevant to the present case, however, because there were no underlying dutiable repairs performed in CSD 83–18. The issue before Customs was whether the stack covers were an additior to the ship's equipment within the meaning of § 1466(a), given that they were discarded at the end of the layover. Customs did not need to consider whether the stack covers were "expenses of repairs" since no repairs were made on the vessel involved.

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[11] Texaco's argument that TMSI did not specifically request that Hellenic perform this work and that the work was not absolutely necessary to accomplish the repairs is without merit. First, Texaco paid for the work. Second, whether the work was necessary to accomplish the repairs is not relevant under the "but for" standard for "expenses of repairs."

Accordingly, we affirm the imposition of the vessel repail duty on the expenses associated with protective coverings identified by invoice item G–2(f).

CONCLUSION

The judgment of the Court of International Trade is affirmed.

COSTS

Each party shall bear its own costs.

AFFIRMED

LASKO METAL PRODUCTS, INC., PLAINTIFF-APPELLANT *v.* UNITED STATES, DURABLE ELECTRICAL METAL FACTORY, LTD., PARAGON INDUSTRIES, HOLMES PRODUCTS CORP., ESTEEM INDUSTRIES, LTD., WUXI FAN FACTORY, SHELL ELECTRIC MFG. (CHINA) CO., LTD., SMC ELECTRIC MFG. CO., SMC MARKETING CORP., WING TAT ELECTRIC MFG. CO., LTD., WING TAT ELECTRIC MFG. (INT'L) CO., LTD., CHINA MILES CORP., POLARAY INDUSTRIAL, AND PARAGON INDUSTRIES, INC., DEFENDANTS-APPELLEES

Appeal 93–1242

(Decided December 29, 1994)

Lawrence J. Bogard, McKenna & Cuneo, of Washington, DC, argued for plaintiff-appellant. With him on the brief was *Peter Buck Feller*.

Jeffrey M. Telep, Attorney, Commercial Litigation Branch, Department of Justice, of Washington, DC, argued for defendant-appellee, The United States. With him on the brief were *Stuart E. Schiffer*, Acting Assistant Attorney General and *David M. Cohen*, Director. Of counsel was *Alicia D. Greenidge*, U.S. Department Commerce. Also on the brief were *Stephen C. Powell*, Chief Counsel for Import Administration and *Berniece A. Browne*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S Department of Commerce, of counsel.

Arthur J. LaFave, III, Dickstein, Shapiro & Morin, of Washington, DC, argued for defendants-appellees, Durable Electrical Metal Factory, Ltd., Paragon Industries, Holmes Products Corp. and Esteem Industries Ltd. With him on the brief was *Douglas N. Jacobson*.

John N. Korns, Pettit & Martin, of Washington, DC, represented defendants-appellees, Shell Electric Mfg. (China) Co. Ltd., SMC Electric Mfg. Co., SMC Marketing Corporation.

James Taylor, Jr., Stroock & Stroock & Lavan, of Washington DC, represented defendants-appellees, Wing Tat Electric Mfg. Co., Ltd., Wing Tat Electric Mfg. (Int'l) Co., Ltd., China Miles Co., Ltd. and Polaray Industrial Corporation. Of counsel were *Panagiotis C. Bayz* and *Matthew H. McCarthy*.

William J. Clinton, Wilkie, Farr & Gallagher, of Washington DC, represented Wuxi Fan Factory.

Appealed from: U.S. Court of International Trade.
Judge RESTANI.

Before MICHEL, *Circuit Judge*, SMITH, *Senior Circuit Judge*, and PLAGER, *Circuit Judge*.

PLAGER, *Circuit Judge.*

This is a dumping case. The appeal in this case challenges the way in which the Department of Commerce (Commerce) calculates the foreign market value (FMV) in making its determination of a dumping margin when dealing with a nonmarket economy country (NME). The question posed is whether the governing statute requires Commerce to ignore the best evidence on costs that is available to it—costs actually paid by the manufacturer in the NME—and instead use only surrogate numbers when it employs a "factors of production" calculation Appellant Lasko Metal Products (Lasko) argues that Congress, whether it meant to or not, has required exactly that. The Government and the industry members who would be adversely affected argue that there are more than enough words in the statute to permit Commerce to employ the methodology it uses, either because the statute specifically grants Commerce that flexibility or because the statute is silent on the point and Commerce's reading is a permissible one.

The statute that Congress has written establishing the policy and procedures governing antidumping and countervailing duties is a detailed and complex one. As we shall explain, we cannot find in the statute any precise prohibition on the use of Commerce's methodology, and there is much in the statute that supports the notion that it is Commerce's duty to determine margins as accurately as possible, and to use the best information available to it in doing so. Accordingly, we affirm the judgment of the Court of International Trade in *Lasko Metal Products v. United States*, 810 F. Supp. 314 (Ct. Int'l Trade 1992), upholding a determination by the Department of Commerce, International Trade Administration (ITA), of the fair value of certain fans imported from China.

BACKGROUND

Lasko is a United States manufacturer of ceiling and oscillating fans. On October 31, 1990, Lasko petitioned the ITA and the United States International Trade Commission (ITC) alleging that certain Chinese manufacturers of electric ceiling and oscillating fans were dumping their merchandise on the United States market, and that the domestic industry was thereby materially injured. In response to Lasko's petition, the ITC on December 27, 1990, issued a preliminary affirmative injury determination. *Certain Electric Fans From the People's Republic of China*, 55 Fed. Reg. 53,203 (USITC 1990).

The ITA for its part undertook an investigation to determine if there were sales at less than fair value. *Oscillating Fans and Ceiling Fans from the People's Republic of China*, 55 Fed. Reg. 49,320 (Dep't Comm. 1990). The ITA sent a questionnaire to numerous Chinese manufacturers. After receiving the responses the ITA issued a preliminary determination of sales at less than fair value. *Oscillating Fans and Ceiling Fans From the People's Republic of China*, 56 Fed. Reg. 25,664 (Dep't Comm. 1991). In its preliminary determination, the ITA concluded that

China was a NME.[1] The ITA therefore calculated pursuant to statute FMV for ceiling and oscillating fans manufactured in China by estimating the value of the factors of production. Because the actual costs of certain factors of production in China were not known, the ITA used the cost of elements of production in a surrogate country (Pakistan), in addition to certain known costs of production, which were the prices the Chinese manufacturers paid for manufacturing supplies on the international market.

After the initial determination, responses were verified, briefs were submitted, hearings were held, and comment was received. Effective October 22, 1991, the ITA entered a final determination that Chinese fans were being sold in the United States at slightly less than fair value. *Oscillating Fans and Ceiling Fans From the People's Republic of China,* 56 Fed. Reg. 55,271 (Dep't Comm. 1991). Since the fans were sold at only slightly less than fair value, the ITA preliminarily found correspondingly low antidumping duty margins.

On December 2, 1991, the ITC notified the ITA of its final determination that the dumping of fans materially injured United States industry. *Certain Electric Fans From the People's Republic of China,* 56 Fed. Reg. 64,642 (USITC 1991). The ITA then issued, effective December 9, 1991, *Antidumping Duty Orders and Amendments to Final Determiations of Sales at Less than Fair Value: Oscillating Fans and Ceiling Fans From the People's Republic of China,* 56 Fed. Reg. 64,240 (Dep't Comm. 1991).

Thereafter Lasko sued in the Court of International Trade both the ITA and the Chinese manufacturers, claiming that the combination of surrogate costs and actual costs used by the ITA to calculate FMV was illegal under the express terms of the Act,[2] and that, as a result, the antidumping duties imposed on the fans from China were too low. The ITA responded that its methodology was well within the discretion granted to it by the Act. The Court of International Trade decided in favor of the ITA and the Chinese manufacturers. *Lasko Metal Products,* 810 F. Supp. 314. Lasko appeals that decision to this court.

DISCUSSION

Lasko contends that the Act explicitly sets forth a hierarchy of methodologies through which FMV is to be determined. If the ITA cannot calculate FMV using the primary method, the ITA must resort to the secondary one, and if that is unworkable, recourse is had to the third, and so forth. Lasko contends that the plain language of the Act requires strict segregation of the methodologies for determining FMV.

Appellees are of the view that the Act does not speak to the question presented by this case, and therefore it vests considerable discretion in the ITA. Appellees urge deference to the ITA's determination under

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[1] It is unquestioned that, whatever changes may have occurred over the last few years, China is not a market economy. *Oscillating Fans and Ceiling Fans From the People's Republic of China,* 56 Fed. Reg. 25,664, 25,667 (Dep't Comm. 1991) (detailing ITA findings of Chinese producers' costs that were not market-based).

[2] Section 773 of the Tariff Act of 1930, as amended by, *inter alia,* the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1316(a), 102 Stat. 1186, 1189 (1988), codified as amended at 19 U.S.C. § 1677b(c) (1988).

Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984), which stated that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based upon a permissible construction of the statute." *Id.* at 843 (footnote omitted).

Lasko's answer to appellees is that *Chevron* specifically excludes this case from the rule urged by them:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

Id. at 842–43 (footnote omitted). Lasko argues that the statute speaks directly to the question, and the intent of Congress is unmistakable.

The answer to the question posed lies then in the language of the Act. In general, the Act provides that the FMV of imported merchandise is the price at which it is sold in the principal markets of the country from which it is exported (the home market), or if there is no home market, the price at which it is sold to countries other than the United States (third party markets). 19 U.S.C § 1677b(a)(1) (1988). Under certain circumstances a third method for determining FMV, called "constructed value " may be employed. 19 U.S.C. § 1677b(a)(2) (1988).

However, if the merchandise under investigation is exported from a NME, a special provision, 19 U.S.C. § 1677b(c) (1988), applies; that provision applies here since the determination that China is a NME is not challenged. Section 1677b(c) states:

> **(c) Nonmarket economy countries.**
>
> **(1) In general**
>
> If—
>
> (A) the merchandise under investigation is exported from a nonmarket economy country, and
>
> (B) the administering authority finds that available information does not permit the foreign market value of the merchandise to be determined under subsection (a) of this section.
>
> the administering authority *shall determine* the foreign market value of the merchandise *on the basis of the value of the factors of production utilized in producing the merchandise* and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses, as required by subsection (e) of this section. Except as provided in paragraph (2), the *valuation of the factors of production shall be based on* the best available information regarding *the values of such factors in a market econony* country or countries considered to be appropriate by the administering authority. (Emphasis supplied.)

Simply put, if the ITA cannot determine FMV pursuant to the general provisions of § 1677b(a), then the ITA must use the factors of produc-

tion methodology to *estimate* FMV for the merchandise in question. Paragraph 4 of § 1677b(c) further provides that the ITA "shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are at a level of economic development comparable to that of the nonmarket economy country, and significant producers of comparable merchandise."

The ITA found that available information did not permit FMV to be determined under subsection (a). Pursuant to § 1677b(c)(1), then, the ITA applied the challenged version of the factors of production methodology to determine FMV. The ITA figured certain factors of production, for example the cost of factory overhead, on the basis of the factor's cost in a surrogate country, Pakistan. As noted, § 1677b(c)(4) specifically authorizes the ITA to use surrogate countries to estimate the value of the factors of production.

But with regard to other factors of production, for example supplies required for the manufacture of the fans, the ITA took the cost to be the amount the Chinese manufacturers actually paid on the international market for the supplies they used. The issue presented by this case is whether or not the Act permits the ITA to determine the factors of production using both surrogate country values and actual cost values.

Lasko argues that the Act expressly prohibits mixing methodologies for calculating FMV. Lasko insists that the text of ¶ (c)(1) emphasized above *requires* that if FMV cannot be calculated according to one of the "normal" methods set forth in § 1677b(a), i.e., on the basis of home market sales prices, third country sales prices, or constructed value, then FMV *must* be calculated on the basis of surrogate values obtained from a market economy. According to Lasko, the text of the Act is clear: congress has required ITA to determine FMV in a NME solely on the basis of surrogate factors of production.

On the contrary, ¶ (c)(1) provides that in determining FMV in a NME, the ITA shall take into account the various factors set out in § 1677b(e). Subsection (e) relates to the determination of constructed value of imported merchandise for purposes of § 1677b(a), and includes factors such as the cost of materials and labor, ¶ (e)(1)(A); general expenses and profit, ¶ (e)(1) (B); and shipping preparation, ¶ (e)(1)(C) The Act simply does not say—anywhere—that the factors of production must be ascertained in a single fashion. The Act requires the ITA determination to be based on the "best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority." 19 U.S.C. § 1677b(c)(1). In this case, the best available information on what the supplies used by the Chinese manufacturers would cost in a market economy country was the price charged for those supplies on the international market. *See Allied-Signal Aerospace Co. v. United States*, 996 F.2d 1185, 1191 (Fed. Cir. 1993) (statutory purpose "is to facilitate the determination of dumping margins as accurately as possible * * *").

As the Court of International Trade correctly observed, although Lasko's "alternative interpretation of the statute requiring that ITA abandon all actual prices once it is forced to resort to surrogate country values might have been possible, * * * such an interpretation would conflict with the overall statutory purpose." *Lasko Metal Products,* 810 F. Supp. at 317–18. The purpose of the Act is to prevent dumping, an activity defined in terms of the marketplace. The Act sets forth procedures in an effort to determine margins "as accurately as possible." *Rhone Poulenc, Inc. v. United States,* 899 F.2d 1185, 1191 (Fed. Cir. 1990)." Where we can determine that a NME producer's input prices are market determined, accuracy, fairness, and predictability are enhanced by using those prices. Therefore, using surrogate values when market-based values are available would, in fact, be contrary to the intent of the law." *Oscillating Fans and Ceiling Fans from the People's Republic of China,* 56 Fed. Reg. 55271, 55275 (Dep't Comm. 1991) (final determination).

In situations in which a statute does not compel a single understanding, the Supreme Court and this court have held that "our duty is not to weigh the wisdom of, or to resolve any struggle between, competing views of the public interest, but rather to respect legitimate policy choices made by the agency in interpreting and applying the statute." *Suramerica de Aleaciones Laminadas, C.A. v. United States,* 966 F.2d 660, 665 (Fed. Cir. 1992).[3] The Court of International Trade held that the ITA's methodology for determining the FMV of the fans from China was reasonable and consistent with the agency's statutory authority. We see no error in this determination.

AFFIRMED

[3] *Suramerica* relied on the Supreme Court's *Chevron* analysis. In *Suramerica,* the issue was whether the agency's official interpretation of its organic legislation was a permissible reading of the statute. The policy underlying the Supreme Court's grant in *Chevron* of special deference to agency regulations and similar official agency pronouncements does not extend to every agency action—it would not, for example, extend to *ad hoc* representations on behalf of the agency, such as litigation arguments. In this case the issue is much like that in *Suramerica*—an officially mandated agency methodology considered by the agency to be within its statutorily granted discretion.

MITSUBISHI ELECTRONICS AMERICA, INC., PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 94–1292

(Decided December 29, 1995)

Kevin M. O'Brien, Baker & McKenzie, of Washington, DC, argued for plaintiff-appellant. With him on the brief were *Thomas P. Ondeck* and *William D. Outman, II*.

John S. Groat, Commercial Litigation Branch, Department of Justice, of Washington, DC, argued for defendant-appellee. *Frank W. Hunger*, Assistant Attorney General, *David M. Cohen*, Director and *Marc E. Montalbine*, Attorney, Commercial Litigation Branch, Department of Justice, of Washington, DC, were on the brief for defendant-appellee. Also on the brief were *Stephen J. Powell*, Chief Counsel for Import Administration, *Berniece A. Browne*, Senior Counsel for Antidumping Litigation and *Patrick V. Gallagher, Jr.*, Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel.

Terence P. Stewart and *Wesley K. Caine*, Stewart & Stewart, of Washington, DC, were on the brief for the Amicus Curiae, The Torrington Company.

Appealed from: U.S. Court of International Trade.
Judge CARMAN.

Before MICHEL, *Circuit Judge*, BENNETT, *Senior Circuit Judge*, and RADER, *Circuit Judge*.

RADER, *Circuit Judge*.

The United States Customs Service (Customs) denied Mitsubishi's protest of an antidumping duty rate. The United States Court of International Trade dismissed Mitsubishi's appeal. *Mitsubishi Elecs. Am., Inc. v. United States*, 848 F. Supp. 193, 203 (Ct. Int'l Trade 1994). Mitsubishi appeals the dismissal. Because Mitsubishi sued the Government under the wrong jurisdictional statute and the limitations period had expired under the proper statute, this court affirms.

BACKGROUND

Mitsubishi Electronics America, Inc. (MELA) imports 64K Dynamic Random Access Memory components (64K DRAMs) from Japan into the United States. The Department of Commerce (Commerce) investigated these products in response to a petition that alleged dumping margins as high as 94% of the foreign market value. On December 11, 1985, Commerce published a preliminary less-than-fair-value (LTFV) determination for MELA's parent company, Mitsubishi Electric Corporation (MELCO). *64K Dynamic Random Access Memory Components (64K DRAMs) from Japan*, 50 Fed. Reg. 50,649 (Dep't Comm. 1985) (prelim. determ. of sales at LTFV). Because Commerce was unable to read computer tapes from MELA that contained price data, Commerce applied a "best information available" rate. This rate was the 94% margin that domestic manufacturers of 64K DRAMs alleged. Customs thus ordered MELA to post bonds at a rate of 94% on entries of MELCO's 64K DRAMs.

Before making a final LTFV determination, Commerce verified MELA's price data. On April 21, 1986, Commerce published a final

13.43% weighted-average dumping margin for MELCO. *64K Dynamic Random Access Memory Components (64K DRAMs) from Japan,* 51 Fed. Reg. 15,943 (Dep't Comm. 1986) (final determ. of sales at LTFV). This reduced MELA's bond rate from 94% to 13.43%.

The International Trade Commission issued its determination of material injury to United States industry on June 6, 1986. Commerce published an antidumping order ten days later. *Antidumping Duty Order; 64K Dynamic Random Access Memory Components (64K DRAMs) from Japan,* 51 Fed. Reg. 21,781 (Dep't Comm. June 16, 1986) (antidumping order). This order required MELA to post cash deposits of 13.43% on later entries of its 64K DRAMs.

Commerce then publicized the opportunity for interested parties to request administrative review of its antidumping determination. *Antidumping or Countervailing Duty Order, Finding or Suspended Investigation,* 52 Fed. Reg. 21,338 (Dep't Comm. 1987) (opport. to request admin. review). The first review period ran from December 11, 1985 to May 31, 1987. The notice stated that if no party sought review by June 30, 1987, Commerce would instruct Customs automatically to assess duties under 19 C.F.R. § 353.53a(d)(1) (1987). *Id.*

Only one company, Motorola, requested review. It later withdrew that request. Without a review request, Commerce automatically assessed antidumping duties. For entries of 64K DRAMs between the preliminary and final LTFV determinations, Commerce assessed duties of 94% on MELA. For entries on or after the effective date of Commerce's final LTFV determination, April 29, 1986, Commerce assessed duties of 13.43% on MELA. *Mitsubishi,* 848 F. Supp. at 195.

Customs liquidated the entries made during the review period, on October 21, 1988. On January 5, 1989, MELA filed an administrative protest with Customs under 19 U.S.C. § 1514 (1988 & Supp. V 1993). MELA challenged the preliminary assessment of duties at 94%, and the assessment of interest on entries during the review period. Following a memorandum from Commerce, Customs denied MELA's protest of the antidumping duty rate, but granted its protest of the interest assessment.

MELA challenged Customs' denial of its rate protest in the Court of International Trade. MELA sued under 28 U.S.C. § 1581(a) (1988). MELA predicated its suit on the initial section 1514 administrative protest, because section 1581(a) requires exhaustion of such protests prior to a lawsuit.

The Court of International Trade held that section 1514 did not apply to MELA's suit. *Mitsubishi,* 848 F. Supp. at 198 Accordingly, the trial court held that 28 U.S.C. § 1581(i) (1988 & Supp. V 1993), not section 1581(a), provided jurisdiction for MELA's challenge. The court reasoned that section 1581(a) requires a valid section 1514 protest as a predicate, while a suit under section 1581(i) does not. Because a two-year statute of limitations governs section 1581(i) challenges, however,

the Court of International Trade barred MELA's claim. *Mitsubishi,* 848 F. Supp. at 198–201. MELA appeals.

DISCUSSION

The issues on appeal are purely legal. This court reviews them *de novo. Guess? Inc. v. United States,* 944 F.2d 855, 857 (Fed. Cir. 1991).

I

The first issue on appeal is whether the Court of International Trade had jurisdiction over Mitsubishi's protest under 28 U.S.C. § 1581(a). Section 1581(a) provides: "The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under [19 U.S.C. § 1515 (1988 & Supp. V 1993)]." Section 1515 requires an aggrieved party to file a protest under section 1514, which Customs must either grant or deny, before the party may sue under section 1581(a). *See Nichimen Am., Inc. v. United States,* 938 F.2d 1286, 1291–92 (Fed. Cir. 1991).

Section 1514(a) identifies the decisions that are subject to protest:

> [D]ecisions of the Customs service, including the legality of all orders and findings entered into by the same, as to
>
> (1) the appraised value of merchandise;
>
> (2) the classification and rate and amount of duties chargeable;
>
> (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
>
> (4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;
>
> (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof;
>
> (6) the refusal to pay a claim for drawback; and
>
> (7) the refusal to reliquidate an entry under section 1520(c) of this title;
>
> shall be final and conclusive upon all persons * * * unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade * * *.

19 U.S.C. § 1514(a). Section 1581(a) provides no jurisdiction for protests outside these exclusive categories. *Playhouse Import & Export, Inc. v. United States,* 843 F. Supp. 716, 719 (Ct. Int'l Trade 1994).

MELA's suit falls outside the section 1514 (a) categories. Section 1514(a) applies exclusively to Customs "decisions" within the enumerated categories. Section 1514 (a) expressly refers to "decisions of the Customs service."* Section 1514 (a) does not embrace decisions by other agencies.

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* At the time of MELA's protest, the statute referred to "decisions of the appropriate Customs officer." 19 U.S.C. § 1514 (1988). The, subsequent change in language, however, does not affect this court's analysis.

The actions that MELA challenges, however, are not Customs decisions. Commerce, not Customs, calculates antidumping duties. The Trade Agreements Act of 1979 (1979 Act) transferred administration of the antidumping laws from the United States Treasury Department to Commerce. Pub. L. No. 96–39, 101, 93 Stat. 148, 169–70 (1979). Under the present antidumping law, Commerce calculates and determines antidumping races. 19 U.S.C. § 1675 (1988 & Supp. V 1993). Commerce conducts the antidumping duty investigation, calculates the antidumping margin, and issues the antidumping duty order. Commerce then directs Customs to collect the estimated duties. *See* 19 U.S.C. § 1673(e)(1) (1990).

The 1979 Act amended 19 U.S.C. § 1514(a) and (b) to exclude antidumping determinations from the list of matters that parties may protest to Customs. As part of its administration of the antidumping laws under the Trade and Tariff Act of 1984 (1984 Act), Commerce conducts reviews of duty orders when requested. Pub. L. No. 98–573, 98 Stat. 2948 (1984); *Nichimen,* 938 F.2d at 1290–91. The 1979 Act requires Commerce, not Customs, to conduct an administrative review of a duty order before judicial review at the Court of International Trade. *Nichimen,* 938 F.2d at 1291 (citing 28 U.S.C. § 1581(c)).

If an interested party wants Commerce to assess duties at the actual, rather than the estimated, rate of dumping, it may request administrative review of the duties under section 751 of the 1979 Act. If no party makes such a request, Commerce instructs Customs automatically to assess duties at the estimated rate.

Customs merely follows Commerce's instructions in assessing and collecting duties. Customs does not determine the "rate and amount" of antidumping duties under 19 U.S.C. § 1514(a)(2). Customs only applies antidumping rates determined by Commerce. Further, Customs has a merely ministerial role in liquidating antidumping duties under 19 U.S.C. § 1514(a)(5). Customs cannot "modify * * * [Commerce's] determinations, their underlying facts, or their enforcement." *Royal Business Machs., Inc. v. United States,* 507 F. Supp. 1007, 1014 n.18 (Ct. Int'l Trade 1980), *aff'd,* 669 F.2d 692 (CCPA 1982).

In sum, title 19 makes clear that Customs does not make any section 1514 antidumping "decisions." Customs actions regarding dumping do not fall within 19 U.S.C. § 1514(a). Thus, without a decision under section 1514(a), the trial court correctly determined that it lacked jurisdiction under section 1581(a). Therefore, the Court of International Trade lacks section 1581 (a) jurisdiction over MELA's suit.

By declining to dismiss MELA's initial protest, Customs did not create jurisdiction within the Court of International Trade for MELA's suit. Federal courts may only hear cases as authorized by Congress. *Bell v. New Jersey & Pennsylvania,* 461 U.S. 773, 777 (1983); *Sampson v. Murray,* 415 U.S. 61, 68 (1974). Only actions of Congress, not an administrative agency, can confer subject matter jurisdiction on a federal

court. Customs' inaction did not grant the Court of International Trade jurisdiction over this protest.

II

Because 28 U.S.C. § 1581(a) does not confer jurisdiction on the trial court, MELA alternatively asserts jurisdiction under section 1581(i). Section 1581(i) provides:

> In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenues;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

28 U.S.C. § 1581(i). Section 1581(i) provides a jurisdictional basis for challenges not covered by other subsections of section 1581. *Cf. Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988).

MELA could not invoke the remedies in section 1581(a)–(h). The automatic assessment procedure at issue in this case, however, pertains to the "administration and enforcement" of laws "providing for * * * duties." Therefore, according to the language of title 28, the trial court apparently had jurisdiction over this case under section 1581(i)(2), (4).

The statute of limitations, however, requires that section 1581(i) actions be brought within two years after accrual of the cause of action. 28 U.S.C. § 2636(i) (Supp. V 1993). MELA commenced its action in the Court of International Trade on February 21, 1992. Thus, to avoid a time bar, MELA must show that its cause of action accrued within the two-year limit.

A cause of action accrues when "all events" necessary to state the claim, or fix the alleged liability of the Government, have occurred. *United States v. Commodities Export Co.*, 927 E.2d 1266, 1270 (Fed. Cir. 1992), *cert. denied*, 113 S. Ct. 1256 (1993). In other words, a claim accrues when "the aggrieved party reasonably should have known about the existence of the claim." *St. Paul Fire & Marine Ins. Co. v. United States*, 959 F.2d 960, 964 (Fed. Cir. 1992).

MELA's claim arises from the automatic assessment of antidumping duties under 19 C.F.R. § 353.53a(d)(1) (1987). This regulation applies once a party's opportunity to request an administrative review expires. Commerce's initial notice allowed MELA to request review through

June 30, 1987. Neither MELA nor any other interested party requested administrative review by that time. Section 353.53a(d)(1)'s automatic assessment procedure therefore went into effect on July 1, 1987. The regulation and Commerce's notice informed MELA that Commerce would assess duties on the 64K DRAMs beginning July 1, 1987. *St. Paul,* 959 F.2d at 964. MELA's cause of action accrued, and the statute of limitations began to run, on July 1, 1987 when all the events necessary to state the claim had occurred. *Commodities Export Co.,* 927 F.2d at 1270.

MELA's section 1514 (a) protest did not toll the statute of limitations during the pendency of the protest. An administrative proceeding does not toll the limitations period unless the proceeding is a mandatory prerequisite to filing suit. *Omni U.S.A., Inc. v. United States,* 663 F. Supp. 1130, 1133 n.7 (Ct. Int'l Trade 1987), *aff'd,* 840 F.2d 912 (Fed. Cir.), *cert. denied,* 488 U.S. 817 (1988); *Lipp v. United States,* 301 F.2d 674, 675 (Ct. Cl. 1962), *cert. denied,* 373 U.S. 932 (1963). Filing an administrative protest with Customs was not a prerequisite to MELA's suit under 28 U.S.C. § 1581(i). Further, the Court of International Trade properly held that MELA could not make a section 1514 protest as a matter of law. *Mitsubishi,* 848 F. Supp. at 203.

In sum, MELA's misguided pursuit of a protest that Congress did not make available neither tolled the two-year limitations period nor delayed the accrual date for MELA's claim beyond 1987. Therefore, MELA's action in the Court of International Trade, which was filed on February 21, 1992, is time-barred under 28 U.S.C. § 2636(i).

CONCLUSION

The Court of International Trade lacked jurisdiction over MELA's claim under 28 U.S.C. § 1581(a). The two-year statute of limitations bars MELA's claim under 28 U.S.C. § 1581(i). The Court of International Trade correctly dismissed MELA's claim.

COSTS

Each party shall bear its own costs.

AFFIRMED

SURAMERICA DE ALEACIONES LAMINADAS, C.A., CONDUCTORES DE ALUMINIO DEL CARONI, C.A., INDUSTRIA DE CONDUCTORES ELECTRICOS, C.A., AND CORPORATION VENEZOLANA DE GUAYANA, PLAINTIFFS-APPELLEES *v.* UNITED STATES, AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS-APPELLEES, AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANT-APPELLANT, AND SOUTHWIRE CO., DEFENDANT-APPELLANT

Appeal No. 93–1579 and 93–1021

(Decided December 30, 1994)

Wendy E. Ackerman, Shearman & Sterling, of Washington, DC, argued for plaintiffs-appellees. With her on the brief were *Thomas B. Wilner* and *Thomas A. DiBiase*. Of counsel was *Jeffrey M. Winton*. *Claire E. Reade*, Arnold & Porter, of Washington, DC, represented the plaintiffs-appellees.

Stephen Mclaughlin, Attorney, Office of the General Counsel, U.S. International Trade Commission, argued for the defendants-appellants. With him on the brief were *Carol McCue Verratti*, Attorney, *Lyn M. Schlitt*, General Counsel and *James A. Toupin*, Assistant General Counsel. *Michael S. Kane*, Attorney, Department of Justice, of Washington, DC, *Velta A. Melnbrencis* and *David M. Cohen*, Attorneys, represented the defendants-appellants, The United States.

Lawrence J. Bogard, McKenna & Cuneo, of Washington, DC argued for defendant-appellant, Southwire Company. With him on the brief was *Catherine E. Edmondson*.

Appealed from: U.S. Court of International Trade.
Judge MUSGRAVE.

Before MICHEL, PLAGER, and RADER, *Circuit Judges*.

RADER, *Circuit Judge*.

The International Trade Commission (ITC) found that Venezuelan imports of aluminum electrical conductor rod (EC rod) pose a threat of material injury to a domestic industry. The Court of international Trade reversed for lack of substantial evidence supporting the threat finding and remanded *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 818 F. Supp. 348 (Ct. int'l Trade 1993) *(Suramerica)*. ITC then rescinded its threat finding. The Court of International Trade affirmed *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 841 F. Supp. 1220 (Ct. Int'l Trade 1993) Because the record supports these Court of International Trade determinations, this court affirms.

BACKGROUND

EC rod is an intermediate product between primary aluminum and finished aluminum wire and cable The domestic EC rod industry includes seven producers: Southwire Company; Alcan Aluminum Corporation; Aluminum Company of America (Alcoa); Essex Wire and Cable; Kaiser Aluminum and Chemical Corporation; Noranda Aluminum, Inc.; and Reynolds Metal Company. Several are vertically integrated producers who smelt primary aluminum, convert it into EC rod, and then process EC rod into aluminum wire and cable. Vertically integrated producers make most of the domestic EC rod supply.

Because the major portion of the electric power grid in the United States is complete, the EC rod market primarily supplies rod for repair

and replacement of existing power lines across the nation. *Suramerica,* 818 F. Supp. at 355. Thus, with the completion of the power grid, the market for EC rod is no longer constantly expanding, but has reached a plateau. Due to the shift to a stable market, domestic manufacturers have scaled back their production of EC rod. *Id.*

A cyclical high in domestic EC rod production occurred in 1984. *See Suramerica,* 818 F. Supp. at 356. Demand, however, did not continue to rise. With inventories rising and a shift downward in price, the result was a "crash" in the EC rod market shortly after the 1984 high. *Id.* In response, the domestic industry accelerated downsizing to eliminate excess inventories and reduce supply to match the reduced demand. *Id.* at 355–56. This action helped return the domestic industry to health. The domestic EC rod industry has remained consistently profitable. *Id.* at 357.

Appellees Suramerica de Aleaciones Laminadas, C.A (Sural); Conductores de Aluminio del Caroni, C.A.; and Industria de Conductores Electricos, C.A. (together, the Venezuelan producers or industry) are Venezuelan manufacturers and exporters of EC rod. As domestic production dropped, imports of Venezuelan EC rod increased from 7% of the U.S. market in 1984 to 15% in 1985. Venezuelan imports have accounted for 12–15% of the market since 1985. Sural, which accounts for 90% of all Venezuelan imports, began keeping inventories of imported rod in the United States in 1987. Sural stored 4,000 tons of EC rod in the United States in 1987, and almost 7,500 tons in the first quarter of 1988. By comparison, domestic purchasers bought 346,000 tons of EC rod in 1987.

The Venezuelan producers have spare EC rod production capacity. Limits on the supply of raw materials, however, constrain their ability to increase production. World market aluminum supplies are not an attractive source because EC rod profit margins are low relative to transportation costs. Venezuelan producers cannot afford to purchase primary aluminum abroad and ship it to Venezuela for processing. *See Suramerica,* 818 F. Supp. at 358–60.

Domestic manufacturer Southwire founded Sural in 1975 as a joint venture with a Venezuelan firm. Southwire helped Sural enter the U.S market in 1984 and 1985. Southwire itself purchased much of Sural's U.S. imports in 1984–85. *Suramerica,* 818 F. Supp. at 368 Southwire advised Sural during this period on making sales in the United States. *Id.* The relationship soured, however, and Southwire sold its interest in Sural in 1985. *Id.* at 369

In 1987 Southwire petitioned the International Trade Administration (ITA) and ITC to impose countervailing and antidumping duties on Venezuelan EC rod imports *Id.* at 352. ITA determined that the Venezuelan industry enjoyed government subsidies, and sold EC rod in the United States at less than fair value (LTFV). *Certain Elec. Conductor Alum. Redraw Rod from Venez.,* 53 Fed. Reg. 24,763 (Dep't Comm. 1988) (final affirmative countervailing duty determination) *(Subsidy*

Retort); Certain Elec. Conductor Alum. Redraw Rod from Venez., 53 Fed. Reg. 24,755 (Dep't Comm. 1988) (final determination of sales at LTFV).

ITC then investigated whether Venezuelan imports materially injured or posed a threat of material injury to a domestic industry. As part of its investigation, ITC sent a questionnaire to domestic EC rod industry members and other interested parties. The questionnaire asked each producer to check one of three boxes: supports the petitions; opposes the petitions; or does not want to take a position on the petitions.

None of the industry members checked the support box. One industry member, Alcoa, expressed opposition. *Suramerica*, 818 F. Supp. at 361. The others refused to take a position. *Id.* at 363 None have experienced or expect negative effects on their EC rod business from Venezuelan imports. *See id.* at 366. Other interested parties expressed opposition to the petitions including General Electric Company, the Aluminum Trade Council, and the Aluminum Brick and Glass Workers Union. *Id.* at 361.

Some industry members expressed additional views on the petitions in private statements ITC withheld from the Venezuelan producers. In some instances, these additional views clarified a producer's reasons for withholding support from the petitions.

The ITC staff did not compare the prices of EC rod produced by vertically integrated producers with Venezuelan imports. Based on the limited volume of remaining domestic sales, the ITC staff found that Venezuelan rod was cheaper than domestic rod in five of nine quarterly price comparisons, and more expensive in the other four. *Suramerica*, 818 F. Supp. at 357–58.

Nonetheless ITC found that the domestic industry is vulnerable to EC rod imports *Certain Elec. Conductor Alum. Redraw Rod from Venez.*, Nos. 701–TA–287, 731–TA–378, 1988 ITC LEXIS 64, at *13 (Int'l Trade Comm'n Aug. 1988) (final determination) *(Threat Determination)*. ITC also found that Venezuelan imports pose a threat of material injury under the factors specifically enumerated in 19 U.S.C. § 1677(7)(F)(i) (1988) *Threat Determination* at *13–21

The Court of International Trade reversed. *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 746 F. Supp. 139, 141 (Ct. Int'l Trade 1990). The court reasoned that, without industry support, Southwire did not have standing to bring the petitions "on behalf of" the domestic industry. *Id.* On appeal, this court held that ITA had discretion to initiate an investigation in response to a petition from an interested party who alleged that it was filed on behalf of an industry, without necessarily determining first that it was affirmatively supported by a majority or some other specified number of the domestic industry. *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F. 2d 660, 667, ___ Fed. Cir. (T) ___, ___ (Fed. Cir. 1992) *(Suramerica-CAFC)*.

On remand, the Court of International Trade held on the merits that substantial evidence did not support ITC's threat determination. *Suramerica*, 818 F. Supp. at 375. The court reasoned that the domestic

industry was healthy, and that comparison to 1984 was inappropriate because that year represented a cyclical high for the industry. *Id.* at 356–57, 370. The court also evaluated the factors enumerated in section 1677(7)(F)(i) for threat determinations, together with other factors such as the lack of domestic industry support and Southwire's past relationship with Sural. *Id.* at 357–75. The court remanded for ITC to rescind its determination or explain how substantial evidence supports it. *Id.* at 375

Southwire and ITC appealed to this court, which dismissed the appeals as unripe. *Suramerica de Aleaciones Laminadas, C.A. v. United States,* Nos. 93–1337, 93–1350, 1993 US APP LEXIS 14,879 (Fed. Cir. May 26, 1993). ITC then rescinded its threat finding under protest. *Certain Elec. Conductor Alum. Redraw Rod from Venez.,* No. 701–TA–287 (Int'l Trade Comm'n June 2, 1993) (determination on remand). The Court of International Trade affirmed. *Suramerica de Aleaciones Laminadas, C.A. v. United States,* 841 F. Supp. 1220 (Ct. Int'l Trade 1993) Southwire and ITC appeal.

DISCUSSION

The Court of International Trade examines an ITC determination of a threat of material injury to discern whether it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). This court has determined to review the Court of International Trade by reapplying the substantial evidence standard to the underlying ITC determination. *Trent Tube Div. v. Avesta Sandvik Tube AB,* 975 F.2d 807, 813 (Fed. Cir. 1992).[1] This court reviews both ITC's threat determination and ITC's subsequent rescission of the threat determination for substantial evidence. *See id.*

Although reviewing anew the ITC determination, this court will not ignore the informed opinion of the Court of International Trade That court reviewed the record in considerable detail Its opinion deserves due respect.

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[1] This rule originated with *Atlantic Sugar, Ltd. v. United States,* 744 F.2d 1556 (Fed. Cir. 1984), which states without support:

> We review [the Court of International Trade's] review of an ITC determination by applying anew [section 1516a(b)(1)(B)'s] express judicial review standard.

Id. at 1559 n.10

Atlantic Sugar appears to rely on a belief that statute prescribes this court's standard of review. Read as a whole, however, section 1516a does not support this proposition. Section 1516a(b)(1)–(B) provides that "the court" must apply the statutory standard in actions brought under 19 U.S.C. § 1516a(a)(2) (1988). Section 1516a(a)(2) addresses the Court of International Trade's review of certain ITC determinations. Thus "the court" of section 1516a(b)(1)(B) is the Court of International Trade. Section 1516a is silent on what standard this court should apply when reviewing a Court of International Trade decision.

Were this a case of first impression, this court might follow the example of the Supreme Court when it was called on to review a review of an administrative action:

> Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the [court reviewing the agency determination]. This Court will intervene only in what ought to be the rare instance when the [substantial evidence] standard appears to have been misapprehended or grossly misapplied.

Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951). Congress has placed the review of ITC determinations in the keeping of the Court of International Trade. That court has the statutory mission to review ITC determinations for substantial evidence. If in a future appeal this court were offered the opportunity to reconsider the *Atlantic Sugar* rule *en banc,* this court might better consider only whether the Court of International Trade misapprehended or grossly misapplied the statutory standard.

I

ITC shares responsibility with ITA for countervailing duty and antidumping investigations 19 U.S.C. §§ 1671(a), 1673(a) (1988). ITA determines whether the accused class of imports enjoys a subsidy or is sold at LTFV in the United States. *Id.* ITC determines whether the imports materially injure or threaten to materially injure U.S industry. *Id.*

Title 19 guides ITC in ascertaining a threat of material injury. 19 U.S.C. § 1677(7) (1988 & Supp. V 1993). At the outset, section 1677(7)(A) defines "material injury" as a "harm which is not inconsequential, immaterial, or unimportant." Thus, a threat of a material injury must pose a risk of significant harm to the domestic industry.

Underscoring this emphasis on the significance of the threatened injury, section 1677(7)(F)(ii) states:

> Any determination by the Commission under this title that an industry in the United States is threatened with material injury shall be made on the basis of evidence that the threat of material injury is real and that actual injury is imminent. Such a determination may not be made on the basis of mere conjecture or supposition.

Therefore, a finding of a threat of material injury requires substantial evidence on the record as a whole that domestic industry faces a real threat of imminent material injury from the accused imports. Mere conjecture or supposition is not enough.

Section 1677(7) also identifies specific factors ITC must consider in assessing the threat of material injury The statute unambiguously directs ITC to consider these factors and "other relevant economic factors" in assessing a threat of material injury. Section 1677(7)(F)(i); *see also* H.R. Rep. No. 725, 98th Cong., 2d Sess. 39 (1984) ("The Commission should examine all [r]elevant factors relating to possible threat of material injury * * *."). Because the ITC must consider all "relevant economic factors it must examine beyond the factors specified in section 1677(7) any other factors that tend "to make the existence of a [threat of material injury] more probable or less probable than it would be without the [factors]." Fed. R. Evid. 401 (defining relevancy); 19 C.F.R. § 210.42(b) (1994) (relevant evidence admissible in ITC investigations).

This court's decision in *Trent Tube* does not afford ITC discretion whether to consider relevant economic factors beyond those listed in section 1677(7) when examining a threat of material injury. In *Trent Tube,* the ITC had found actual material injury. 975 F.2d at 809–11. Section 1677(7)(B)(ii) states that ITC "may" consider relevant economic factors beyond those listed when examining an actual injury. *See Trent Tube,* 975 F.2d at 814 (the ITC "may also consider other relevant factors"). As already explained, however, the standard for assessing a "threat of material injury" is different. Section 1677(7)(F)(i) directs that ITC "shall" consider all relevant economic factors in a threat investigation. Section 1677(7)(F)(i) leaves ITC with no discretion in this mat-

ter. Thus, the breadth of relevant factors in *Trent Tube,* a material injury case, does not govern in this threat of material injury case.

The wider scope of a threat investigation reflects the greater uncertainty and risk of error involved in prospective relief. *See* H.R. Rep. No. 1156, 98th Cong., 2d Sess. 174 (1984) ("the projection of future events is necessarily more difficult than the evaluation of current data"). ITC must not disregard any relevant economic factor that might help in making this difficult assessment. *See id.* (ITC must "conduct a thorough, practical, and realistic evaluation" of the market).

The Court of International Trade, following the statutory directive, ordered ITC to consider two factors not listed in the statute that tend to show a threat of material economic harm—domestic industry support for the petitions, and the views of other interested parties such as consumers of EC rod. *Suramerica,* 818 F. Supp. at 375. This order obeys the statutory requirement to consider other relevant economic evidence in a threat investigation.

The views of the potentially threatened domestic industry on the nature of the threat and the views of consumers of the imports are without doubt relevant to whether the domestic industry faces a threat of material injury. The industry best knows its own economic interests and, therefore, its views can be considered an economic factor. Indeed an industry's failure to acknowledge an affirmative threat has direct significance. *See Oregon Steel Mills Inc. v. United States,* 862 F.2d 1541, 1543–46 (Fed. Cir. 1988) (dismissing challenge to ITA revocation of antidumping duties opposed by the domestic industry). And in the difficult enterprise of projecting future economic harm the industry's views take on added relevance. Moreover, publicly expressed industry support for the petition, or lack of it, is probative evidence of those views.

The Court of International Trade's adherence to the statutory standard for relevant economic factors is fully consistent with this court's holding in *Suramerica-CAFC.* In *Suramerica-CAFC,* this court determined that ITA has discretion to find that a petition filed by a single interested party suffices to confer standing "on behalf of" the industry. *Suramerica-CAFC,* 966 F.2d at 667 Thus, an investigation may be underway on the filing by a single interested party "on behalf of" the industry. Once the investigation is underway, however, the statute mandates consideration of relevant economic factors, including industry views, as shown, for example, by industry support for the petition

In making a determination of threat of material injury, ITC must weigh industry views and views of other interested parties, together with all other relevant economic factors as appropriate under the record of each particular investigation. ITC may use its sound discretion in determining the weight to afford these and all other factors, but ITC cannot ignore them. Thus the Court of International Trade's remand

instruction that the ITC consider these factors was required by the statute.[2]

II

This court now turns to a review of the record to determine whether substantial evidence supports ITC's threat determination. "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938), *quoted in Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). Furthermore, the Court of International Trade and this court cannot evaluate the substantiality of evidence supporting an ITC determination "merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951). Instead, "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Id.* at 488; *accord Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556. 1562 (Fed. Cir. 1984).

As noted earlier, section 1677(7) sets forth several economic factors to consider in assessing material injury or threats of material injury. This court will follow the statutory and other factors in reviewing the record evidence of threat.

1. *Nature and Effects of the Subsidy (Section 1677(7)(5)(i), (F)(i)(I)):*

The ITA subsidy report discussed reasons for Venezuela's export bond program. The Venezuelan producers explained in the report that the bond program, which accounts for almost all of the gross subsidy on Venezuelan EC rod, only compensates for official overvaluation of the Bolivar. *Subsidy Retort*, 53 Fed. Reg. at 24,769 (Comment 2).[3] The Venezuelan producers also contended that the prevailing free market exchange rate correlated with the subsidy. *Id.* at 24,769–70 Southwire did not controvert these contentions. *See id.*

ITC, apparently conceding that the export bond program compensated for Venezuelan exchange rate constraints, found that this program still provided "an even more important incentive to imports." *Threat Determination*, 1988 ITC LEXIS 64, at *16 n. 34. The export bond program, however, only facilitated the opportunity for Venezuelan

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[2] The Court of International Trade erred, however, by stating that lack of industry support could only be overcome by "compelling evidence." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 818 F. Supp. 348, 364 (Ct. Int'l Trade 1993). ITC has discretion to weigh all types of relevant evidence in making a threat determination. Statute provides no basis for treating one type as more important than the others.

The Court of International Trade also erred by instructing ITC not to consider private statements by industry members that the Venezuelan producers could not review. *Suramerica*, 818 F. Supp. at 365–66. During this investigation, 19 C.F.R. § 207.7(a) (1988) countenanced ITC consideration of confidential information not available to parties The Venezuelan producers have not challenged the validity of former section 207.7(a). The private statements were admissible, and they are relevant to the level of industry support ITC must consider them.

But that is not to say that ITC may rely on such statements to justify disregarding the unwillingness of a domestic industry to publicly support a petition. That the industry is not willing to express public support is evidence that it does not perceive a real threat of immediate harm. Private statements of support, but for other interests, can diminish but not eliminate the probative value of this relevant evidence.

[3] ITA rejected this argument not because it was inaccurate, but rather because the Venezuelan government administers the export bond program and its exchange rate controls separately. *Certain Elec. Conductor Alum. Redraw Rod from Venez.*, 53 Fed. Reg. 24,763, 24,770 (Dep't Comm. 1988).

producers to compete in export markets on a level playing field. Thus, the bond program did not provide Venezuelan producers with a subsidy advantage over U.S. manufacturers. ITC did not consider this, and thus did not comply with section 1677(7)(E)(i)'s requirement that ITC consider the likely effects of any subsidy.

The record as a whole does not show any significant potential harm to domestic industry, but suggests that the subsidy program only compensates the Venezuelan producers for a competitive disadvantage. Thus, the record does not suggest a real threat to the domestic EC rod industry.

2. *Venezuelan Production Capacity Likely to Result in a Significant Increase in EC Rod Imports (Section 1677(F)(i)(II), (IV)):*

The Venezuelan producers have spare production capacity. ITC consequently found that Venezuelan capacity to produce EC rod may soon increase. *Threat Determination* at *16. On the other hand, as the Court of International Trade pointed out, the record shows that Venezuelan producers are not likely to obtain enough primary aluminum to increase EC rod production. *See Suramerica,* 818 F. Supp. at 358–60 (summarizing record). Due to transportation costs, Venezuelan EC rod producers cannot afford to purchase primary aluminum on the world market *Id.* at 358–59. Nor can they share in pending increases in the supply of Venezuelan primary aluminum, which are nearly all committed to other uses. *Id.* at 359.

As the Court of International Trade correctly observed, "[t]he issue is whether the Venezuelans are going to replace domestic market share to the point of posing an imminent threat of injury." *Suramerica,* 818 F. Supp. at 372. Upon a careful review of the record, the court found no basis for holding that the Venezuelan producers can readily obtain increased supplies of primary aluminum.[4] *Id.* at 360, 372. The record as a whole, as the court showed. does not suggest a real threat that the Venezuelan producers can acquire sufficient primary aluminum to significantly increase their imports to the United States.

3. *Increase in Market Penetration to an Injurious Level (Section 1677(7)(B)(i)(I), (F)(i)(II):*

United States market penetration by Venezuelan EC rod imports stabilized after 1985 During 1984–85, when United States market penetration increased, "[i]mports from Venezuela made a modest entry into the United States * * * in part because it served Southwire's interests. The Venezuelan imports were also welcomed by other members of the EC rod industry * * *." *Suramerica,* 818 F. Supp. at 369. Southwire itself purchased large amounts of Sural's 1984–85 imports. *Id.* at 368. Indeed Southwire advised Sural on making sales in the United States. *Id.* As the Court of International Trade correctly noted. Southwire's cooperation

[4] ITC had relied on Sural's plans to buy U.S. rod and cable plants as suggesting that respondents "could" substantially increase their imports to the United States. *Certain Elec. Conductor Alum. Redraw Rod from Venez.*, Nos. 701–TA–287, 731–TA–378, 1988 ITC LEXIS 64, at *20 (Int'l Trade Comm'n Aug. 1988) (final determination). Sural and Alcoa, however, previously supplied the plants in question with primary aluminum. Thus, planned ownership changes will not increase imports. *Suramerica,* 818 F. Supp. at 361. Moreover, Alcoa opposes the petitions, indicating that it perceives no threat of material injury. *Id.*

during the only period when market penetration by Venezuelan imports significantly increased undercuts Southwire's protestations about Venezuelan imports posing a real threat *Id.* at 374.

4. *Probability that Imports Will Enter the United States at Depressive or Suppressive Prices (Section 1677(7)(B)(i)(II), (F)(i)(IV):*

In five of nine comparisons with the domestic price, the price of Venezuelan rod was lower; in the other four, the domestic rod price was lower. *Suramerica,* 818 F. Supp. at 357–58. Furthermore, the fabrication component of the domestic EC rod price—the portion of the EC rod price above the cost of primary aluminum—has increased since 1984. *Id.* at 370. Thus the price of the value added by domestic RC rod manufacturers has risen despite the presence of Venezuelan imports.

The majority of domestic consumers of EC rod preferred domestic rod over Venezuelan rod unless the foreign product was much less expensive. The ten comparison prices, however, did not show marked price differences. Thus, the record suggests that Venezuelan rod will have little depressive or suppressive effect on domestic prices, both because its prices are not significantly lower and because consumers prefer domestic rod. *See Threat Determination,* 1988 ITC LEXIS 64, at *58 (Dissenting Views of Acting Chmn. Brunsdale) (record facts, including erratic shipments of Venezuelan EC rod and Buy-American requirements in utility and governmental purchases "tend to indicate a low elasticity of substitution" between Venezuelan and domestic EC rod).

ITC noted that Venezuelan imports enjoyed transportation freight advantages in the United States because most sales occurred within 100 miles of their ports of entry. *Id.* at *20. These same freight costs, however, prevent Venezuelan producers from competing effectively for sales in other areas of the country

Again, the Court of International Trade observed that Southwire apparently counseled Sural to cut its prices in 1984 and 1985. *Suramerica,* 818 F. Supp. at 368. Southwire did not challenge this finding on appeal Southwire itself, the largest U.S. producer of EC rod, did not perceive lower prices for Venezuelan EC rod to pose a threat of material injury. On the record as a whole, the pricing data do not show such a threat.

5. *Substantial Increases in U.S. Inventories of Imported EC Rod (Section 1677(7)(F)(V)):*

United States inventories of Venezuelan EC rod increased from 4,000 tons in 1987 to almost 7,500 tons in the first quarter of 1988. The Court of International Trade correctly put this amount in the context of its potential effect on the U.S. market. *See Suramerica,* 818 F. Supp. at 374 With a 1987 U.S. market of 346,000 tons, the increase of Venezuelan inventories was not substantial. The record does not suggest that the increase in Venezuelan inventory levels, small compared to domestic consumption of EC rod, poses a real threat to the domestic industry.

6. *Condition of the Domestic Industry (Section 1677(7)(B)(i)(III), (C)(iii)):*

The Court of International Trade noted: "The financial data relating to the [domestic] EC rod industry show a decline in most financial indicators during 1985, followed by consistent upward movement thereafter." *Suramerica,* 818 F. Supp. at 357. The court further attributed "the health of the rod industry" to rising demand catching up with shrinking capacity, the result of large-scale industry rationalization after the United States became completely electrified in the early 1980's. *Id.* at 355–57. The domestic industry has remained consistently profitable. *Id.* at 357.

The record provides at best limited support for ITC's interpretation of the condition of the domestic industry as "improving but still vulnerable." ITC employed data from 1984, the time of a cyclical high in the domestic EC rod industry, *id.* at 356, as its benchmark in assessing the condition of the U.S. industry. Furthermore, ITC itself acknowledged that the financial data on which it relied was "limited in value" because most domestic EC rod is produced by vertically integrated manufacturers who consume the EC rod internally. *Threat Determination,* 1988 ITC LEXIS 64, at *10. Thus ITC's conclusion rests on incomplete data compared to an inappropriate benchmark. The domestic EC rod industry does not appear to be particularly susceptible to injury by reason of Venezuelan imports.

7. *Other Demonstrable Adverse Trends (Section 1677(7)(F)(i)(VII)):*

ITC asserted that the European Economic Community (EEC), another export market for the Venezuelan industry, has a quota system with dramatically increased tariffs for imports beyond the limit. Venezuela "reportedly" had already exceeded its quota for 1988. *Threat Determination* at *20 n. 44. Southwire and ITC contend on appeal that the EEC quota might cause Venezuelan producers to divert imports to the United States and threaten domestic industry.

The Court of International Trade found that ITC relied on information without proper substantiation and ignored a letter the Venezuelan producers offered in rebuttal. *Suramerica,* 818 F. Supp. at 371. Even assuming the accuracy of the tariff information, however, it shows no more than a possible motive for Venezuelan producers to increase their imports to the United States This record evidence does not show an imminent threat of material injury.

8. *Industry Views:*

One domestic EC rod industry member, Alcoa, affirmatively opposes these petitions. *Suramerica,* 818 F. Supp. at 361. The others neither have experienced nor expect negative effects on their EC rod business as a result of Venezuelan imports. *Id.* at 366. Thus, those with the greatest stake in competition with foreign producers have not publicly indicated that they perceive imports as threatening.

Even the private explanations of members of the industry for their reluctance to support Southwire's petition do not negate the Court of International Trade's conclusion that the industry perceives no imminent threat. Two do not support the petitions even privately. Two others stated that they might support the petitions, had they not chosen to put other corporate interests first. Corporations threatened with material injury, however, would hardly place other corporate priorities ahead of survival. These other superseding priorities suggest that these domestic industry members do not perceive a real and imminent threat of material harm.

9. *Views of Other Interested Parties:*

The Court of International Trade correctly considered the views of interested domestic parties outside the EC rod industry as relevant to whether the industry faces a threat of material injury. *Suramerica,* 818 F. Supp. at 361–63. Southwire challenges the credibility of the outside parties. This objection goes to the weight and not the relevance of their views. ITC erred by ignoring them.

10. *Summary:*

The lack of significant support for the petitions and the equivocal evidence as to the factors listed in the statute are not substantial evidence that the domestic EC rod industry faces a real threat of imminent material injury. The Court of International Trade correctly overturned ITC's threat determination for lack of substantial evidence.

III

On remand, ITC rescinded its threat determination without adding to the record. The record does contain substantial evidence supporting this rescission. The Court of International Trade correctly affirmed ITC's rescission of its threat finding.

CONCLUSION

Given the lack of record evidence that imports of Venezuelan EC rod pose an imminent threat to the domestic industry, the Court of International Trade was correct to reverse and remand the ITC determination of threat of material injury. The Court of International Trade was also correct to affirm ITC's subsequent rescission of its threat determination.

COSTS

Bach party shall bear its own costs.

AFFIRMED

CRYSTAL CLEAR INDUSTRIES, PLAINTIFF-APPELLANT *v.*
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 94–1245

(Decided January 9, 1995)

Steven P. Florsheim, Grunfeld, Desiderio, Lebowitz & Silverman, of New York, New York, argued for plaintiff-appellant

John J. Mahon, Assistant Branch Director, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for defendant-appellee. With him on the brief were *Frank W. Hunger,* Assistant Attorney General, *David M. Cohen,* Director and *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office. Also on the brief was *Mark D. Nackman,* Office of the Assistant Chief Counsel, U.S. Customs Service, of counsel.

Appealed from: U.S. Court of International Trade.
Judge MUSGRAVE.

Before ARCHER, *Chief Judge,* MAYER and PLAGER, *Circuit Judges.*

PER CURIAM.

Crystal Clear Industries ("Crystal Clear"') appeals the January 28, 1994, judgment of the Court of International Trade, *Crystal Clear Indus. v. United States,* 843 F. Supp. 721 (Ct. Int'l Trade 1994), which upheld the Customs Services classification of certain glassware gift boxes along with the glassware they contained. The Customs Service classified the boxes under item 546.60 of the Tariff Schedules of the United States ("HTSUS"), or subheadings 7013.21.10, 7013.29.20, 7013.39.20, and 9405.50.40 of the Harmonized Tariff Schedules of the United States ("HTSUS"), and not as "[b]oxes of paper, of paperboard, of papier-mache, or of any combination thereof" under TSUS item 256.54, or as "[c]artons, boxes and cases, of corrugated paper or paperboard" under HTSUS subheading 4819.10.00. Duties were assessed on the glassware classified under HTSUS subheading 9405.50.40 at the column 2 rate of 45% *ad valorem*; duties were assessed on the remaining glassware at the column 2 rate of 60% *ad valorem.*

The items, imported during the years 1988 through 1990, are decorated cardboard boxes made in column 1 (most-favored) nations, which are imported containing glassware made in Eastern European column 2 nations. Crystal Clear argues that the Court of International Trade erred in finding that the boxes were the "usual" and "normal" packing for glassware under TSUS General Headnote 6(b) or under HTSUS General Rule of interpretation 5(b). Second, Crystal Clear argues that, under TSUS General Headnote 6(b), those boxes that were not necessary to make the items seaworthy (i.e., those that were double-boxed) are not dutiable with the glassware. Third, for those items imported after the effective date of the HTSUS, Crystal Clear argues that the language of HTSUS General Rule of Interpretation 5(b) requires only that the boxes be classified with the glassware, not that they be dutiable at the same rate as the glassware. Crystal Clear argues in the alternative that the boxes are not dutiable at the column 2 rate because they never

entered the commerce of the column 2 countries. The government argues that the court correctly held that the cost of the boxes was part of the appraised value of the glassware and that the boxes were dutiable at the column 2 rate applicable to the glassware.

TSUS General Headnote 6(b) states that "[c]ontainers or holders if imported containing or holding articles are subject to tariff treatment as follows: (i) * * * containers of usual types ordinarily sold at retail with their contents, are not subject to treatment as imported articles. Their cost, however, is, under section 462 of the tariff act, a part of the value of their contents and if their contents are subject to an *ad valorem* rate of duty such container or holders are, in effect, dutiable at the same rate as their contents * * *." Section 402 of the tariff act provides that "packing costs," or "the cost of all containers and coverings of whatever nature and of packing, whether for labor or materials, used in placing merchandise in condition, packed ready for shipment to the United States," are included in the dutiable value of the merchandise contained in the packing. 19 U.S.C. § 1401a(b)(1)(A)(h)(3) (1988). HTSUS General Rule of Interpretation 5(b) states that "packing materials and packing containers entered with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods."

We affirm the judgment of the Court of International Trade, for the reasons stated in its opinion.*

AFFIRMED

* Our agreement with the opinion of the CIT does not extend to the suggestion that a routine classification dispute is entitled to special deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

LONZA, INC., PLAINTIFF-APPELLANT *v.*
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 94–1335

(Decided January 31, 1995)

Jack D. Mlawski, Galvin & Mlawski, of New York, New York; argued for plaintiff-appellant. With him on the brief was *John J. Galvin.*

Bruce N. Stratvert, Attorney, Commercial Litigation Branch Department of Justice, of Washington, DC, argued for defendant appellee. With him on the brief were *Frank W. Hunger,* Assistant Attorney General, *David M. Cohen,* Director and *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office. Also on the brief was *Jacob D. Diamond,* Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of counsel.

Appealed from: U.S. Court of International Trade.
Judge GOLDBERG.

Before PLAGER, *Circuit Judge,* COWEN, *Senior Circuit Judge,* and RADER, *Circuit Judge.*

PER CURIAM.

Lonza, Inc. (Lonza) appeals the decision of the United States Court of international Trade in *Lonza, Inc. v. United States,* 849 F. Supp. 51 (Ct. Int'l Trade 1994). The court upheld the decision of the United States Customs Service (Customs) classifying imports of ADC–6, an organic chemical compound that is used as an intermediate in the production of the antibiotic Imipenem. Customs had classified the compound as "oxygen-function Amino-compounds-Other" under subheading 2922.50.50 of the Harmonized Tariff Schedule of the United States (HTSUS). Imports classified under this subheading are dutiable at the rate of 7.9% *ad valorem*. Lonza agrees that ADC–6 is described under this subheading of HTSUS but argues that the compound should be classified under HTSUS subheading 2941.90.50 entitled "Antibiotics-Other", dutiable at the lower rate of 3.7% *ad valorem*.

It is well established that the meaning of a tariff term is a question of law reviewable *de novo* by this court, while the determination of whether a particular article fits within that meaning is a question of fact, reviewable for clear error. *See Simod Am. Con. v. United States,* 872 F.2d 1572, 1576, 7 Fed. Cir. (T) 82, 86 (1989). We have applied that standard in our consideration of the record, including the briefs and arguments of counsel, and conclude that the Court of international Trade correctly held that the chemical compound in issue was properly classified by the Customs Service Lonza has not shown that the court's findings of fact are clearly erroneous. We adopt the opinion of the Court of International Trade for the reasons stated in its opinion, a copy of which is attached as an Appendix.

APPENDIX

(Slip Op. 94–50)

LONZA, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 90–03–00143

[Judgment for defendant.]

(Dated March 25, 1994)

Galvin & Mlawski (Jack D. Mlawski, John J. Galvin), for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Bruce N. Stratvert),* for defendant.

OPINION

GOLDBERG, *Judge:* This matter is before the court following trial *de novo.* Plaintiff, Lonza, Inc. ("Lonza"), challenges the decision of the United States Customs Service ("Customs") to classify imports of ADC-6,[1] an acyclic organic compound, as other oxygen-function amino-compounds under subheading 2922.50.50 of the Harmonized Tariff Schedule of the United States ("HTS").[2] Lonza argues that although ADC-6 is described by this subheading, ADC-6 is more properly classified under subheading 2941.90.50, HTS, as other antibiotics.[3] Lonza notes that if its merchandise is classifiable under two competing headings within this chapter, the heading that is last in numerical order prevails. HTS, Section VI, Chapter 29, Note 3. The government urges that ADC-6 is not susceptible to dual classification, and that therefore Customs' classification should be affirmed.

Lonza's claim for classification of ADC-6 under subheading 2941.90.50 is predicated upon application of a broad definition of the tariff term "drugs" that has developed over the past seventy years. This definition finds most recent expression in the predecessor to the HTS, the Tariff Schedules of the United States ("TSUS"). The issues before the court, then, are: (1) whether and to what extent this definition has survived enactment of the HTS; (2) if it does remain applicable, whether this definition impacts the classification of antibiotics under the HTS; and (3) if it does apply to the classification of antibiotics under the HTS, whether ADC-6 meets this definition. Because the court finds that the TSUS definition of "drugs" does not apply to the classification of antibiotics under the HTS, Customs' classification of ADC-6 is affirmed.

BACKGROUND

The subject merchandise was entered into the United States at JFK International Airport on April 2, 1989. Customs liquidated the entry on July 21, 1989, and Lonza filed its protest on September 27, 1989. Customs denied this protest on March 16, 1990, and Lonza commenced this action contesting that denial on March 22, 1990. All liquidated duties have been paid. The court exercises its jurisdiction pursuant to 28 U.S.C. § 1581(a).

The following evidence was presented at trial. ADC-6 is used by Merck & Company, Inc. ("Merck") in the domestic production of Imipenem, a member of the beta-lactam family of antibiotics. The term "beta-lactam antibiotics" is a general descriptor of a family of related analogs which includes, *inter alia,* penicillins, cephalosporins, carbapenems, penems, and monobactams. Lactams are defined as organic chemical compounds formed by the intra-molecular dehydrative cyclization of a carboxylic acid and an amine. In the case of ADC-6, the amino and carboxylic acid termini are joined by the elimination of one molecule of water, to form a four-membered lactam ring. Betalactams are four-membered ring lactams which are so named because the amino group involved in forming the cycle is located on a carbon atom "beta" to the carboxylic acid. All currently marketed beta-lactam antibiotics contain the four-membered betalactam ring.

Scientific research indicates that the beta-lactam ring is responsible for the ability of beta-lactam antibiotics to kill bacteria. As a result, the beta-lactam ring is also referred to as the killing site. Beta-lactam antibiotics bind themselves to the cell walls of bacteria,

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[1] The subject imported merchandise consists of (2S,3R)-(+)-2-(1S)-Hydroxyethyl-3-Amino-1,5-Pentane-Dioic Acid-5-Methylester, also known as ADC-6.

[2] Oxygen-function amino-compounds that are classified under subheading 2922.50.50, HTS (1989), are dutiable at the rate of 7.9% *ad valorem.*

[3] Antibiotics that are classified under subheading 2941.90.50, HTS (1989), are dutiable at the rate of 3.7% *ad valorem.*

operating to inhibit cell-wall synthesis and thus killing the bacteria. While five- and six-membered lactams are quite stable, four-membered ring betalactams are susceptible to opening of the ring by hydrolysis. When the four-membered beta-lactam ring is broken by hydrolyzing the amide bond, the ability of all beta-lactam antibiotics to kill bacteria is destroyed.

Imipenem is a member of the carbapenem class of antibiotics, and is heterocyclic in chemical structure. Originally, Imipenem was derived from thienamycin. In commercial production, however, Imipenem is synthesized from ADC-6; thienamycin does not exist at any point in this synthesis. In contrast to thienamycin, which is produced naturally by microorganisms, ADC-6 is produced synthetically.

Imipenem also contains a hydroxyethyl side-chain, in addition to its four-membered ring. The purpose of this sidechain is twofold. First, the side-chain contains a recognition element that enables the antibiotic to identify target bacteria. Second, the side-chain protects the antibiotic from betalactameses. Target bacteria defend against an antibiotic by producing enzymes, called beta-lactameses; these enzymes are capable of hydrolyzing the amide bond, thereby cleaving the four-membered beta-lactam ring and thus rendering the antibiotic ineffective. Imipenem's side-chain protects against hydrolysis by these bacterial enzymes.

Merck uses Imipenem in the production of PRIMAXIN®, a potent broad spectrum antibacterial agent intended for intravenous administration. Imipenem itself cannot be administered to patients because it is destroyed by the body's enzymes, and because it exhibits kidney toxicity. As a result, PRIMAXIN® is formulated from a combination of three elements: the antibiotic Imipenem; an inhibitor to protect the anti-biotic against destruction by enzymes; and a buffer to protect against kidney toxicity. Imipenem by itself has never been approved for use as a medicine.

Synthesis of Imipenem is a multi-step process during which ADC-6 undergoes various chemical reactions. The structural elements of Imipenem that are contributed by ADC-6 include the four-membered beta-lactam ring as well as the hydroxyethyl sidechain. In fact, ADC-6 contributes every atom used to form each of these components. Imipenem thus retains the ADC-6 "moiety" or major portion of the ADC-6 molecule. Removal of the ADC-6 moiety from Imipenem would yield a simple unsaturated carboxylic acid; this acid would lack a beta-lactam ring and would be devoid of the ability to kill or inhibit the growth of bacteria. As a result, Lonza concludes that ADC-6 imparts therapeutic properties to the antibiotic Imipenem. Lonza also argues that ADC-6, a chemical intermediate used in the production of Imipenem, is properly considered an ingredient used in the production of a medicine.

DISCUSSION

Prior to enactment of the HTS, imported chemical compounds that: (1) possessed therapeutic properties; and, (2) were chiefly used as ingredients in medicines, merited classification as drugs. Lonza argues that this definition continues to apply under Chapter 29 of the HTS. Before addressing this issue, the court will first examine the evolution of the definition of the tariff term "drugs."

A. *Historical Evolution of the Tariff Term "Drugs":*

The Customs Simplification Act of 1954 directed the Tariff Commission to compile a revision of customs laws classifying imports for tariff purposes. The Commission submitted the *Tariff Classification Study* to Congress and the President on November 15, 1960; a supplemental report was submitted in January, 1962. The Commission's report, as amended, became the Tariff Classification Act of 1962. This act implemented the TSUS, which took effect on August 31, 1963.[4]

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[4] A definition of the tariff term "drugs" can be traced even further, to paragraph 34 of the Tariff Act of 1922. *United States v. Wm. Cooper & Nephews, Inc.*, 22 CCPA 31, 36, T.D. 47038 (1934) (citing Tariff Commission, *Summary of Tariff Information* 91 (1921)). This definition was retained in paragraph 34 of the Tariff Act of 1930, which stated that "the term 'drug' wherever used in this Act shall include only those substances having therapeutic or medicinal properties and chiefly used for medicinal purposes * * *." *Id.* at 35 (emphasis omitted).

In *Synthetic Patents Co. v. United States*, 11 Cust. Ct. 98, 104, C.D. 803 (1943), the court offered the following distinction: "drugs" were substances useful for medicinal purposes, while "medicinal preparations" were products possessing therapeutic properties that were in ready condition for medicinal use. *Id.*

continued

The Explanatory Notes to Schedule 4, Part 1 of the *Tariff Classification Study state:*

> Paragraph 28(a) provides, among other products, for certain products "suitable for medicinal use" and for "medicinals". In the proposed schedules, the former are provided for in items 407.02 through 407.12; and the latter are provided for under the term "drugs" in items 407.20 through 407.90. The term "drugs" is defined in part 3, headnote 2, and its use in part 1 in lieu of the term "medicinals" is for uniformity of concept which would also provide clarification. Although some question was raised at the hearings in connection with this change of terminology, it is believed that no significant change in coverage or rate is involved.[5]

Thus, the drafters of the Tariff Classification Act of 1962 recognized a distinction between drugs and medicinal preparations. The explanatory notes to the Commission's study further state:

> Headnotes 2 through 5, inclusive, define the terms "pesticides", "plastics materials", "plasticizers", and "drugs", *in the light of prevailing customs practice as well as usage in the industry.*

Tariff Classification Study, Schedule 4, Part 1, at 21 (emphasis added). As enacted, Schedule 4, Part 1, subpart C, Headnote 5, TSUS (1963), contained the following definition:

> The term *"drugs"* in this subpart means those substances having therapeutic or medicinal properties and chiefly used as medicines or as ingredients in medicines.

This definition remained unchanged throughout the entire controlling period of the TSUS.[6]

In response to a request by the President dated August 24, 1981, the U.S. International Trade Commission ("ITC") initiated an investigation in order to prepare a conversion of the TSUS into the nomenclature of the Harmonized System. The ITC submitted its initial report in June 1983.[7] Annex I to this report contained the proposed Converted U.S. Tariff Schedule. The definition of "drugs" was now placed in Chapter 29, Additional U.S. Legal Note 1(c), which stated:

> The term *"drugs"* means compounds having anesthetic, prophylactic, or therapeutic properties and principally used as an active ingredient in a medicament.

Other than changing focus from "substances" to "compounds," and broadening the reference to include anesthetic and prophylactic compounds, this definition retains the two substantive elements found in the TSUS definition. Significantly, however, the proposed tariff schedule no longer designated "antibiotics" as a subset of the broader heading

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The Customs Court revisited the distinction between drugs and medicinal preparations under the Tariff Act of 1930 in *Synthetic Patents Co. v. United States,* 12 Cust. Ct. 148, 152, C.D. 845 (1944). The court held that a substance possessing therapeutic properties, which were enhanced upon conversion into a medicinal preparation, was properly classified as a drug. Because the subject merchandise required a chemical change to achieve practical medicinal value, the court determined it was ineligible for classification as a medicinal preparation. *Id.*

This distinction was further refined in *Biddle Sawyer Corp. v. United States,* 50 CCPA 85, 320 F.2d 416 (1963). The *Biddle* court determined that in order to be properly classifiable as a medicinal preparation, imported merchandise must possess "curative or alleviative properties in and of itself." *Biddle,* 50 CCPA at 94. The court concluded that the subject merchandise did not possess therapeutic properties because it did not independently act as a curative. And, because the imported merchandise did not induce a desired physiological effect, the court determined that it was not eligible for classification as a medicinal preparation. It appears that appellant-importer did not argue, and the *Biddle* court did not consider, whether, by imparting properties that enhanced the effectiveness of a medicinal preparation, the subject merchandise exhibited therapeutic properties such that it merited tariff treatment as a drug.

[5] The immediate predecessor to Lonza's preferred classification provision, HTS subheading 2941.90.50, is Item 411.76, TSUS (1987), which covered "Drugs: Other: Anti-infective Agents: Antibiotics: Other." Item 411.76, TSUS, was created pursuant to Presidential Proclamation No. 4768 of June 28, 1980. 45 Fed. Reg. 45,135, 45,171 (July 2, 1980). Item 411.76 superseded Item 407.85, TSUS (1963), the originally enacted provision that covered "Drugs: Other."

[6] The TSUS governed U.S. duty rates from August 31, 1963 through December 31, 1988. There were eighteen editions of the TSUS. While the specific numbering of the definition of "drugs" among the headnotes in Schedule 4, Part 1, subpart C, changed over the years, the language employed remained intact. *Compare* Schedule 4, Part 1, subpart C, Headnote 5, TSUS (1963) *with* Schedule 4, Part 1, subpart C, Headnote 9, TSUS (1987).

[7] *Conversion of the Tariff Schedules of the United States Annotated into the Nomenclature Structure of the Harmonized System: Report on Investigation No. 332-131 Under Section 332 of the Tariff Act of 1930,* USITC Publication No. 1400 (June 1983) *("1983 ITC Conversion Report").*

"drugs." Instead, Chapter 29 introduced the term "antibiotics" as an independent heading within the subchapter covering "Other Organic Compounds."[8]

The Trade Policy Staff Committee of the Office of the U.S.Trade Representative reviewed the ITC's 1983 draft proposal; this review resulted in publication of a second edition proposal in September 1984.[9] Notably, the Chapter 29 Notes in this second edition omitted the revised definition of "drugs" that was contained in the ITC's 1983 draft proposal. The Office of the U.S. Trade Representative published a third edition in October 1986, and a final proposed tariff schedule in July 1987. Neither of these drafts incorporated any definition of the term "drugs."[10]

The HTS, enacted as part of the Omnibus Trade and Competitiveness Act of 1988,[11] took effect on January 1, 1989.[12] In contrast to the TSUS, the HTS did not designate "antibiotics" as a subheading of the broader term "drugs." Rather, the term "antibiotics" was designated an independent heading, i.e. Heading 2941.[13] Significantly, none of the forty-two Headings in Chapter 29 of the first edition of the HTS incorporated the term "drugs;" nor have these Headings since been amended to include the term in subsequent editions of the tariff schedule. Although the term "drugs" was retained, its position had been relegated to isolated subheadings, none of which were included under Heading 2941; in fact, the term "drugs" was incorporated into only sixty-three of the approximately 875 subheadings within the original Chapter 29. And, despite retaining the term, the HTS failed to expressly define "drugs" as it was used in the new tariff schedule.

B. *The Austin Decision:*

The seminal case construing the term "drugs" under the TSUS is *Austin Chemical Co. v. United States*, 11 CIT 130, 659 F. Supp. 229, *aff'd*, 6 Fed. Cir. (T) 42, 835 F.2d 1423 (1987). The imported merchandise in *Austin*, consisting of D(–) mandelic acid, was classified by Customs under Item 404.46, TSUS.[14] Plaintiff contended that the merchandise was properly classifiable as a drug under Item 411.91, TSUS.[15] After importation the D(–) mandelic acid was sold to Eli Lilly and Company for use in the synthesis of Cefamandole Nafate, a cephalosporin antibiotic which also contains the four-membered beta-lactam ring. D(–) mandelic acid is a chemical intermediate which, after synthesis, imparts the mandelic acid moiety to Cefamandole Nafate. Unlike the ADC-6 moiety present in Imipenem, the mandelic acid moiety does not form the beta-lactam ring present in Cefamandole Nafate; rather, the mandelic acid moiety appears as a functional side-chain on the four-membered beta-lactam ring. The mandelic acid moiety protects the beta-lactam ring from hydrolysis of the amide bond by beta-lactameses produced by the target bacteria. Absent the mandelic acid moiety, Cefamandole Nafate would be susceptible to cleavage by beta-lactameses, resulting in the effective loss of its antibacterial properties.

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[8] The TSUS classified "other antibiotics" under Item 411.76. Annex II to the ITC's 1983 report provided a cross-reference from the then-existing TSUS to the proposed tariff schedule. The table on page 603 of Annex II converted Item 411.76, TSUS, into five provisions in the new tariff schedule; proposed subheading 2941.90.50 is clearly included among these five provisions. Annex III to the ITC's report provided a cross-reference from the proposed tariff schedule to the then-existing TSUS. The table on page 218 of Annex III converted proposed subheading 2941.90.50 into two TSUS provisions, one of which is Item 411.76. The original draft thus evinces an intent that subheading 2941.90.50 continue to embrace "Drugs: Antibiotics: Other."

[9] *Conversion of the Tariff Schedules of the United States Into the Nomenclature Structure of the Harmonized System, Revised, Showing Administrative Changes Approved by the Trade Policy Staff Committee, Trade Policy Staff Committee*, Office of the U.S. Trade Representative (September 1984).

[10] On October 5, 1987 the ITC instituted investigation No. 332–250; one of the purposes of this study was to prepare a cross-reference between the 1987 TSUS and the final proposed HTS. The ITC's report was published in January 1988. *Continuity of Import and Export Trade Statistics After Implementation of the Harmonized Commodity Description and Coding System: Report to the President on Investigation No. 332–250 Under Section 332 of the Tariff Act of 1930*, USITC Publication No. 2051 (January 1988) (*"1988 Cross-Reference Report"*). The table on page 158 of the report indicates that Item 411.76, TSUS, is converted into subheadings 2941.40.00; 2941.90.10; 2941.90.30; 3003.20.00; 3004.10.50; and 3004.20.00 of the proposed HTS. Subheading 2941.90.50 is clearly absent from this group. It thus appears that the previously evinced intent to retain other antibiotic drugs within the scope of subheading 2941.90.50, HTS, had been abandoned by the time the new tariff schedule was finally enacted. *See supra* note 8.

[11] Pub. L. No. 100–418, § 1204, 102 Stat. 1107, 1148 (1988); *see* 19 U.S.C. § 3004 (1988).

[12] Pub. L. No. 100–418, § 1217, 102 Stat. 1107, 1163 (1988); *see* 19 U.S.C. § 3001 (1988).

[13] Heading 2941, located in subchapter 13, is entitled "Antibiotics." The term "drugs" is noticeably absent as a descriptor of antibiotics, even among the designated subheadings of Heading 2941.

[14] Item 404.46, TSUS, describes "Cyclic organic chemical products * * *: Other: Carboxylic acids * * *: Other."

[15] Item 411.91, TSUS, describes "Products suitable for medicinal use, and drugs: * * * Drugs: Other: Anti-infective agents: Mandelic Acid."

Concededly, the mandelic acid could not be used alone as a curative. The trial court distinguished, however, between substances that are therapeutic and those that possess therapeutic *properties*. Because the imported D(–) mandelic acid imparted desirable properties to Cefamandole Nafate which enhanced the effectiveness of the antibiotic, the subject merchandise was found to possess therapeutic properties.[16] The trial court further relied upon dictionary definitions of the terms "ingredient" and "constituent" to conclude that Congress intended to recognize "that before the chemical reaction[producing Cefamandole Nafate] occurs, the component substances of the compound are properly deemed ingredients." *Austin*, 11 CIT at 135, 659 F. Supp. at 233. Consequently, the court deemed D(–) mandelic acid to be an ingredient possessing therapeutic properties which was properly classifiable as a drug under the TSUS.[17] On appeal, the Court of Appeals for the Federal Circuit affirmed the trial court's decision. In doing so, the court held that the trial court did not err when it determined that "'therapeutic' properties include the imparting of 'properties to the other substances which are necessary to produce an effective antibiotic.'" *Austin*, 6 Fed. Cir. (T) at 45, 835 F.2d at 1426.

C. *TSUS Classification of ADC-6:*

ADC-6 was the subject of protest no. 1001–8–007318, filed on behalf of Merck as protesting party. Customs had classified imported ADC-6 under Item 425.52, TSUS, as Nitrogenous compounds: Other: Other. Upon denial of its protest, Merck commenced an action before this court. Apparently in light of the holding in *Austin*, the parties entered into a Stipulated Judgment on Agreed Statement of Facts. *Merck & Co. v. United States*, Court No. 89–06–00329 (Jan. 8, 1991). In that Stipulated Judgment, the government agreed that ADC-6 was properly dutiable as "other antibiotics obtained, derived, or manufactured in whole or in part from modified benzenoids under Item 411.76, TSUS, at the rate of 6.6% *ad valorem*." *Id.* In the TSUS, antibiotics are located under the broader descriptor "drugs." The government thus conceded that, under the TSUS, ADC-6 was properly classifiable as a drug, and, more specifically, an antibiotic.

D. *Analysis:*

Lonza argues that because there has been no material change in the language of the HTS provision for antibiotics from that found in the TSUS, and because the structure of the HTS allegedly retains a distinction between "drugs" and "medicaments" for tariff purposes, the *Austin* rationale and the *Merck* Stipulated Judgment compel a finding that ADC-6 is classifiable as an antibiotic under Chapter 29 of the HTS. Lonza asserts that, despite its removal from the controlling tariff schedule, the TSUS definition of "drugs" constitutes the common and commercial meaning of the term, and thus governs classification of antibiotic "drugs" under the HTS. The government argues that "[n]owhere in the applicable HTS section notes, the chapter notes, or in the Explanatory Notes[18] is there any indication, at all, that chemical intermediates used in the manufacture of a finished organic chemical product are classifiable under the heading for that finished product absent independent satisfaction of the relevant criteria for such classification." *Defendant's Pretrial Memorandum* at 10. Because ADC-6 does not satisfy the criteria for classi-

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16 The trial court stated that:

> The criterion for a drug is not that it be therapeutic but that it possess therapeutic properties. The ability of the mandelic acid to prevent the breakdown of the beta-lactams cannot be denied. When a substance which possesses such desirable properties, although incapable of use alone, is combined with other substances to produce the physiological action to correct the deficient condition, it may properly be classified as a drug * * *. Therefore, it appears that this characteristic which relates to the treatment of disease by a remedial agent or method is thus, a "therapeutic property".
>
> In comparison, * * * for purposes of the term "medicinal preparation", the substance itself must possess the therapeutic or curative property.
>
> * * * * * * * *
>
> Thus, even though according to [defendant's expert] the D(–) mandelic acid in and of itself may not be therapeutic, it is sufficient that it is crucial to the ultimate formation of the antibiotic so that it may be deemed to possess therapeutic properties.

Austin, 11 CIT at 133–34, 659 F. Supp. at 231–32 (footnote omitted) (citations omitted).

17 The government also argued that the D(–) isomer of mandelic acid was not *eo nomine* "mandelic acid" under Item 411.91, TSUS. Because the subject merchandise satisfied the superior heading of "drugs" in that it possessed therapeutic properties and was used as an ingredient in medicine (the only qualifiers to the *eo nomine* provision "mandelic acid"), and because the TSUS did not contain separate provisions for the various isomers of mandelic acid, the court held the D(–) isomer properly classifiable under Item 411.91. *Austin*, 11 CIT at 136.

18 Customs Co-Operation Council, *Harmonized Commodity Description and Coding System: Explanatory Notes* (1986) (*"Explanatory Notes"*). The Customs Co-Operation Council was established by a Convention signed in Brussels on December 15, 1950. The *Explanatory Notes* constitute the Council's official interpretation of the Harmonized Tariff System.

fication as an antibiotic under the HTS, the government urges the court to affirm Customs' classification decision. The court will first examine whether ADC-6 meets the TSUS definition of "drugs."

1. *ADC-6 satisfies the definition of "drugs" found in the TSUS:*

Based upon the evidence presented at trial, and prior caselaw, the court agrees with Lonza that ADC-6 is a substance that possesses therapeutic properties and is chiefly used as an ingredient in medicine. First, with respect to whether ADC-6 possesses therapeutic properties, it is undisputed that ADC-6 contributes all of the atoms in Imipenem's beta-lactam ring; as Lonza's expert witness, Dr. Thomas N. Salzmann, testified, the beta-lactam ring is the antibiotic's killing site, without which the substance is useless as an antibacterial agent. In addition, ADC-6 contributes the entire hydroxyethyl side-chain, without which Imipenem is both defenseless and unable to identify target bacteria. Clearly, absent the ADC-6 moiety, Imipenem is bereft of therapeutic (i.e. antibacterial) value. Just as D(–) mandelic acid was held to possess therapeutic properties because it "impart[s] properties to * * * other substances which are necessary to produce an effective antibiotic," ADC-6 merits a similar evaluation. Indeed, whereas D(–) mandelic acid contributes only a defense element, ADC-6 imparts a killing element, a recognition element, and a defense element to the final antibiotic product. The significance of these contributions can hardly be ignored.

The government urges, however, that in order to be considered therapeutic, a substance must itself be curative. It is conceded that ADC-6 neither kills nor inhibits the growth of microorganisms. Nonetheless, ADC-6 is properly characterized as having therapeutic properties because the elements it imparts are crucial to the ultimate formation of an effective antibiotic. This is the standard sanctioned by our appellate court,[19] and this standard is met in the present case. The government simply fails to recognize *Austin's* distinction between therapeutic uses and therapeutic *properties*.[20] The court concludes that although ADC-6 itself may not be used as an antibacterial agent, the curative qualities it imparts to Imipenem are of such import that ADC-6 is properly regarded as exhibiting therapeutic properties.

Secondly, the court concludes that ADC-6 is properly considered an ingredient used in the production of Imipenem. At trial, the government's expert witness, Ms. Patricia Gafney, characterized ADC-6 as a mere "stepping stone" between the parent substance and the final product, i.e. a chemical intermediate whose identity is lost during the process of synthesizing Imipenem. Ms. Gafney also testified that the term "ingredient" is not synonymous with the term "chemical intermediate" in the field of chemistry. And finally, the government referred the court to the *Physician's Desk Reference* (46th ed. 1992), which lists the ingredients in PRIMAXIN® as: (1) a sterile formulation of Imipenem; (2) sodium cilastatin; and (3) sodium bicarbonate. ADC-6 is noticeably absent from this list.

Dr. Salzmann testified, however, that characterizing a substance as an ingredient is a functional judgment that is facilitated by identifying the atoms contributed by a substance to the final compound. In addition to this functional analysis, it has long been recognized that when ascertaining the meaning of a tariff term, the court may consult extrinsic sources.[21] *See, e.g., Productol Chemical Co. v. United States,* 74 Cust. Ct. 138,

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[19] *Austin*, 6 Fed. Cir. (T) at 45–46, 835 F.2d at 1426, *aff'g Austin Chemical Co. v. United States*, 11 CIT 130, 659 F. Supp. 229 (1987).

[20] *Austin*, 11 CIT 132–33, 659 F. Supp. at 231–32. The *Austin* court first noted that "therapeutic" is defined to mean "of or relating to the treatment of disease or disorders by remedial agents or methods; CURATIVE, MEDICINAL." *Id.* at 133, 659 F. Supp. at 231 (citing *Webster's Third New International Dictionary* (1966)). The court also noted that "[p]roperties are the characteristics of a substance and chemical properties are the chemical reactions of a substance." *Id.* at 133 n.1, 659 F. Supp. at–232 n.1 (citing *Hackh's Chemical Dictionary* (4th ed. 1969)). Thus, the curative characteristics contributed by a substance via chemical reaction may be deemed "therapeutic properties." In contrast, the term "therapeutic use" indicates that a substance, by itself, is in a condition ready for use as a curative. *See Austin*, 11 CIT at 133, 659 F. Supp. at 231–32.

[21] For example, to support its conclusion that D(–) mandelic acid is an ingredient in Cefamandole Nafate, the *Austin* court cited the following definitions of the term "ingredient":

Webster's Third New International Dictionary, (1966) * * *:

2. That which enters into a compound, or is a component part of any combination or mixture: CONSTITUENT.

continued

142, C.D. 4598 (1975). The court notes that *The Oxford English Dictionary* (2d ed. 1989) defines "ingredient" as:

> **3.a.** Something that enters into the formation of a compound or mixture; a component part, constituent, element. Primarily used of medical compositions and other artificial material mixtures, but also of natural compounds and of things immaterial, actions, conditions, etc.

The court is persuaded that the government adopts too narrow a view. As a substance that enters into the formation of a medical compound, ADC-6 satisfies this dictionary definition. Furthermore, under Dr. Salzmann's functional analysis, the court notes that the *sole* purpose of ADC-6 is to contribute to the formation of Imipenem. And finally, the exhibits introduced at trial clearly indicate that the ADC-6 moiety remains cognizable as a portion of the final synthesized compound. Just as D(–) mandelic acid was determined to be an ingredient used in the production of Cefamandole Nafate, so too is ADC-6 accurately described as an ingredient used in the production of Imipenem.

2. *The TSUS definition of "drugs" constitutes the common and commercial meaning of the term under the HTS:*

Although the court finds that ADC-6 meets the definition of "drugs" found in the TSUS, this conclusion is not dispositive. The second issue to be addressed is whether the TSUS definition of "drugs" continues to apply under the HTS. Lonza argues that notwithstanding the fact that the HTS fails to include an express definition of the term, the TSUS definition of "drugs" continues to govern tariff classification because it reflects the common and commercial meaning of the term, and that meaning has not changed since the HTS was enacted.

Unless a contrary legislative intent is shown, tariff terms are construed in accordance with their common and commercial meanings, which are presumed to be the same. *See, e.g., Nippon Kogaku (USA), Inc. v. United States*, 69 CCPA 89, 92, 673 F.2d 380, 382 (1982); *Schott Optical Glass, Inc. v. United States*, 67 CCPA 32, 34, 612 F.2d 1283, 1285 (1979). The common meaning of a tariff term presents a question of law to be decided by the court. *American Express Co. v. United States*, 39 CCPA 8, 10, C.A.D. 456 (1951). In cases where a term is defined by statute, the court need not undertake a common-meaning inquiry, for the statutory definition is controlling. *Overton & Co. v. United States*, 85 Cust. Ct. 76, 80–81, C.D. 4875 (1980). Absent an express definition, however, the court may consult dictionaries, lexicons, scientific authorities, and other such reliable sources in its effort to determine common meaning. *C.J. Tower & Sons of Buffalo, Inc. v. United States*, 69 CCPA 128, 133–34, 673 F.2d 1268, 1271 (1982).

As noted, the TSUS definition of "drugs" was drafted "in light of prevailing customs practice as well as usage in the industry."[22] Congress' definition was thus intended to coincide with the common and commercial meaning of the term. This definition remained intact as an express provision in each of the eighteen editions of the TSUS, which spanned over twenty-five years. Although it appears that the TSUS definition of "drugs" was deliberately abandoned (in light of the fact that an earlier draft of the HTS contained an amended definition of the term), the HTS failed to provide any alternative definition despite retaining the term "drugs" in various subheadings within Chapter 29. The common meaning of a tariff term, once established, remains controlling until a subsequent change in statute compels a revised construction of the term's meaning. *United States v. Great Pacific Co.*, 23 CCPA 319, 324, T.D. 48192 (1936); *see Sears Roebuck & Co. v. United States*, 46 CCPA 79, 83, C.A.D. 701 (1959). The mere retraction of an express definition from the controlling tariff schedule, in and of itself, does not compel a revised construction. Absent clear evidence of legislative intent to embrace an alternative statutory definition, and in light of its historical pedigree, the court cannot help but conclude that the

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Hackh's Chemical Dictionary, (4th Ed. 1969) * * *:

> **ingredient.** Any constituent of a mixture. Cf. constituent.
>
> **constituent.** (1) An element or part of a compound. Cf. *component* of a mixture. (2) An element or compound formed from the components, * * * of a system.

Austin, 11 CIT at 135, 659 F. Supp. at 233. ADC-6 may similarly be considered an ingredient in Imipenem, when measured against these definitions.

[22] *Tariff Classification Study*, Schedule 4, Part 1, at 21.

TSUS definition of "drugs" survives as the common and commercial meaning of the term under the HTS.[23]

3. *The TSUS definition of "drugs" does not govern the classification of antibiotics under the HTS:*

Having determined that the TSUS definition of "drugs" survives as the common meaning of the term under the new tariff schedule, the court must address whether this definition impacts the classification of antibiotics under the HTS. The court concludes that it does not. There are four elements to the court's analysis.

First, as the government noted at trial, Congress effected an express change in the tariff description of antibiotics when it implemented the HTS; antibiotics are no longer classified as a subset of the broader heading "drugs," as they were under the TSUS. Instead, the term "antibiotics" has been elevated as the *sole* descriptor of Heading 2941. Subchapter 13, Chapter 29, HTS, unambiguously indicates that the only prerequisite to classification under Heading 2941 is satisfaction of the criteria embraced by the term "antibiotics."

Lonza responds to the government's observation with two points. First, Lonza offers the court a side-by-side comparison of Items 411.60 through 411.76, TSUS, and Heading 2941, HTS, in support of its argument that no material change was intended in the tariff treatment of antibiotics under the HTS. This comparison is deficient in one major respect; namely, it fails to acknowledge the deliberate omission of the term "drugs" as a general descriptor of antibiotics under the HTS. It is immaterial that specific provisions for antibiotics remained unchanged in the new tariff schedule. What is significant is that under the HTS, antibiotics constitute an independent Heading within Chapter 29; this is a marked departure from the TSUS framework, which placed antibiotics within the broader descriptor "drugs." Secondly, Lonza notes that in converting the TSUS into the Harmonized System, the ITC was directed to avoid changes in rates of duty wherever possible;[24] and, if the TSUS definition of "drugs" does not apply to Heading 2941, the duty assessed upon imports of ADC-6 will be increased. This drafting guideline, however, simply cannot overcome the actual framework adopted, and the specific language chosen, by Congress when it enacted the HTS.[25] The term "drugs" is expressly limited to sixty-three subheadings in Chapter 29, in utter contrast to its scope under the TSUS. Furthermore, the term is employed nowhere among the eleven subheadings within Heading 2941.[26] The implication is clear. The classification of imports as antibiotics is confined solely to those substances that independently satisfy the criteria for an antibiotic; the term "drugs" is no longer relevant to this classification decision under the HTS.

Second, the court rejects Lonza's assertion that antibiotics should be treated as drugs simply by virtue of their location in Chapter 29. Lonza argues that the HTS incorporates a distinction between drugs and medicaments by classifying the former solely within Chapter 29, while the latter are classified solely within Chapter 30. Lonza bases its position on the fact that "[t]he term 'drugs' appears throughout Chapter 29," while "[t]he term 'medicaments' as well as specific types of medicaments are employed throughout Chapter 30." *Pretrial Memorandum of Plaintiff* at 16 n.4, 18. As the court noted, however, Congress made limited use of the term "drugs" in Chapter 29; had Congress intended that all organic chemicals provided for in Chapter 29 of the HTS be treated as drugs, it would have utilized the term more broadly, just as it did in the TSUS. Furthermore, Lonza's argument is undermined by reference to subheadings 2918.21.10 and 2918.23.10, HTS. Subheading 2918.21.10 describes "Salicylic acid and its salts: Suitable for medicinal use." Subheading 2918.23.10 describes "Salol (Phenyl salicylate) suitable for medicinal use." If the distinc-

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[23] The court's conclusion is further supported by reference to *The Oxford English Dictionary* (2d ed. 1989), which defines the term "drug" as:

> **1.a.** An original, simple, medicinal substance, organic or inorganic, whether used by itself in its natural condition or prepared by art, or as an ingredient in a medicine or medicament. Formerly used more widely to include all ingredients used in chemistry, pharmacy, dyeing, and the arts generally * * *.

This definition accords with that found in the TSUS; thus, it is evident that the TSUS definition continues to reflect the common meaning of the term.

[24] *1983 ITC Conversion Report,* at 30.

[25] This case does not present the first instance in which a classification concept under the TSUS has been altered. *See, e.g.,* Ruth F. Sturm, *Customs Law & Administration* § 50.4 at 21 (1993) (comparing use of the term "of" under the TSUS and "wholly of" under the HTS).

[26] Heading 2941 may be contrasted with Heading 2933, HTS, in this regard. Subheading 2933.59 embraces an additional eight subheadings that are introduced by the broader descriptor "drugs." Similarly, subheading 2933.90 embraces eleven additional subheadings that are introduced by the term "drugs."

tion between drugs and medicaments under the HTS were as absolute as Lonza asserts, these substances should have been provided for under Chapter 30. Instead, they are included in Chapter 29. The historical distinction between drugs and medicaments thus appears irrelevant to the classification of organic chemicals under the HTS.

Third, Lonza asserts that antibiotics are commonly understood to be drugs, and that therefore Heading 2941, HTS, incorporates the TSUS definition of "drugs." The court first notes that *The Oxford English Dictionary* (2d ed. 1989) defines the term "antibiotic" as:

> **2.** Injurious to or destructive of living matter, esp. micro-organisms.
> **3.** [A]n antibiotic substance: one of a class of substances produced by living organisms and capable of destroying or inhibiting the growth of micro-organisms; spec. any of these substances used for therapeutic purposes. Also used of synthetic organic compounds having similar properties.

In addition, *Van Nostrand's Scientific Encyclopedia* (7th ed. 1989) defines the term "antibiotic" as:

> A biochemical drug, derived from one or more kinds of microorganisms, which has the ability to (1) inhibit the growth *(bacteriostatic agent)*, or (2) to kill *(bactericidal agent)* a number of other microorganisms and thus of immense value in treating a number of diseases that result from microbial infection.

The court also notes that each party's expert witness testified that the commonly accepted meaning of the term "antibiotic" includes the ability of a substance to kill or inhibit the growth of bacteria. Indeed, Lonza's expert witness, Dr. Salzmann, testified that ADC-6 would not commonly be considered an antibiotic precisely because it lacks the ability to kill bacteria or to inhibit bacterial growth. Nevertheless, Dr. Salzmann also testified that he believed ADC-6 was properly classified as an "antibiotic," as that term is used in the tariff schedules. Dr. Salzmann thus seems to envision a distinction between the meaning of "antibiotic" as it is used in the HTS, and the commonly accepted meaning of the term. This position is unfounded.

The testimony of both expert witnesses indicates a common understanding of the term "antibiotic" that is consistent with dictionary definitions previously cited. The court recognizes that *Van Nostrand's* refers to an antibiotic as a biochemical drug. Still, the defining characteristic of antibiotic substances common to all definitions is the ability to kill or inhibit the growth of microorganisms. The term "drug" adds nothing to an understanding of what is meant by "antibiotic." Segregation of these terms is further supported by the expert testimony of Ms. Gafney, who proffered thienamycin as an example of a substance that is not considered a drug, and yet is still classifiable under Heading 2941 as an antibiotic. Although thienamycin, by itself, exhibits antibacterial properties, it is not considered a drug because it is not used as a medicine or as an ingredient in a medicine.

Consequently, upon consideration of all of the evidence presented, the court finds that antibiotics are commonly understood to mean substances, produced either naturally or synthetically, that exhibit an ability to kill or inhibit the growth of microorganisms. And, as noted, tariff terms are generally construed in accordance with their common meaning. In this case there is no evidence that Congress intended to apply any meaning other than the common meaning of "antibiotics," nor does there appear to be a conflicting commercial designation of the term. As a result, the court finds that the common meaning of the term "drugs" is not incorporated into the common meaning of the term "antibiotics." Chemical intermediates devoid of the ability to kill or inhibit the growth of bacteria simply do not merit classification as an antibiotic under Heading 2941, HTS.[27]

Fourth, the HTS *Explanatory Notes* support the court's conclusion in this case. While the *Explanatory Notes* do not constitute controlling legislative history, they do offer guidance in interpreting HTS subheadings.[28] *Pfaff American Sales Corp. v. United States,* 17 CIT ___, Slip Op. 93–101 (CIT June 9, 1993). *Explanatory Note* 29.41 offers a narrow defi-

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[27] Dr. Salzmann also testified that in the eyes of the scientific community, the term "chemical intermediate" is not synonymous with the term "antibiotic." It is undisputed that ADC-6 is an intermediate used in the synthesis of Imipenem.

[28] The *Explanatory Notes* to Chapter 29, subchapter XIII, Heading 2941, HTS, state in pertinent part:

> Antibiotics are substances secreted by living microorganisms which have the effect of killing other microorganisms or inhibiting their growth * * *.
> * * * * * * *

continued

nition of the term "antibiotics." The government relies upon this definition and others like it to argue that classification under Heading 2941 is restricted to antibiotics that are produced naturally. The government fails to acknowledge, however, that by including "certain synthetic products closely related to natural antibiotics and used as such," *Note* 29.41 includes substances of purely synthetic origin. While a determination of what is meant by "closely related" is beyond the scope of this opinion, when viewed in its entirety *Explanatory Note* 29.41 does not appear to conflict with the court's determination of what constitutes the common meaning of the term "antibiotics."[29]

Explanatory Note 29.41 includes examples of substances that merit classification as an antibiotic, as well as substances that are not covered by Heading 2941. Because *Explanatory Note* 29.41(b) provides that chemical intermediates used in the manufacture of antibiotics and possessing a very low antibiotic activity are precluded from classification under Heading 2941, the government argues that ADC-6, a chemical intermediate devoid of the ability to kill or inhibit the growth of bacteria, is similarly precluded from such classification. Lonza responds by urging that while "the term 'antibiotic activity' [generally] refers to a substance's ability to kill or inhibit the growth of microorganisms, * * * this construction[,] in the context of *[Explanatory Note* 29.41,] would render the referenced *Explanatory Note* meaningless." *Pretrial Memorandum of Plaintiff* at 32. Specifically, Lonza argues that this reading of *Explanatory Note* 29.41 cannot be sustained because "there exist *no* specifically defined chemical compounds currently used as intermediates in the manufacture of antibiotics which have the ability to kill or inhibit the growth of bacteria." *Id.* at 32–33. Instead, Lonza asserts that "the phrase 'antibiotic activity' must refer to the antibiotic or therapeutic *properties* of compounds used as intermediates in the manufacture of antibiotics." *Id.* at 33.

The court finds Lonza's argument thoroughly unpersuasive. The fact that there are no chemical compounds currently used as intermediates in the manufacture of antibiotics, and which possess an ability to kill or inhibit bacterial growth, does not render *Explanatory Note* 29.41 meaningless; it is entirely possible that such substances exist, but merely await discovery. The authors of the *Explanatory Notes* cannot be faulted for anticipating future developments in the field of biochemistry when they drafted *Note* 29.41.

Moreover, the absence of any antibiotic activity completely satisfies the criterion of "very low antibiotic activity." In the context of the present case, this plain reading of the criteria discussed in *Note* 29.41 affords the *Note's* proscription immediate effect. *Explanatory Note* 29.41 provides that substances exhibiting "very low antibiotic activity" are properly classified within earlier Headings of Chapter 29, according to structure. The court finds that ADC-6 does not exhibit any "antibiotic activity" because it lacks the ability to kill or inhibit the growth of bacteria. This accords with the court's determination of the common meaning of the term "antibiotic." Because the court finds that "very low antibiotic activity" embraces "no antibiotic activity," the *Explanatory Notes* indicate that ADC-6 is properly classified earlier within Chapter 29, according to its chemical structure. This is precisely what Customs did when it classified ADC-6 under Heading 2922 as other

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Antibiotics may consist of a single substance or a group of related substances, their chemical structure may or may not be known or chemically defined. They are chemically diverse and include the following:

(1) **Heterocyclic,** e.g., novobiocin, cephalosporins, streptothricin. The most important of this class are the **penicillins** which are secreted by several species of the fungus *Penicillium*. This class also includes procaine penicillin.

* * * * * * *

(7) **Other antibiotics,** e.g., sarkomycin, vancomycin.

This heading also includes chemically modified antibiotics used as such. These may be prepared by isolating ingredients produced by natural growth of the micro-organism and then modifying the structure by chemical reaction or by adding sidechain precursors to the growth-medium so that desired groups are incorporated into the molecule by the cell-processes (semi-synthetic penicillins); or by bio-synthesis (e.g., penicillins from selected amino-acids).

Natural antibiotics reproduced by synthesis (e.g., chloramphenicol) are classified in this heading, as are certain synthetic products closely related to natural antibiotics and used as such (e.g., thiamphenicol).

This heading **does not cover:**

* * * * * * *

(b) Chemically defined organic compounds with a very low antibiotic activity, used as intermediates in the manufacture of antibiotics **(earlier headings of this Chapter according to structure).**

1 *Explanatory Notes* at 423.

29 To the extent the definition of "antibiotics" found in the *Explanatory Notes* conflicts with the court's determination, that definition is rejected. The expert testimony presented at trial indicates that synthetic and synthetically-modified antibiotics are of recent discovery. Thus, it is not unlikely that dated sources define antibiotics only as naturally-produced substances. As Dr. Salzmann testified, however, the origin of an antibiotic substance has no bearing on its antibiotic activity.

oxygen-function amino-compounds. Based upon the foregoing analysis, the court finds that Customs' classification of the subject merchandise was correct.

CONCLUSION

Although the TSUS definition of "drugs" continues to represent the common and commercial meaning of the term under the HTS, where that term is employed, the relevant statutory framework has changed such that chemical intermediates used in the production of an antibiotic are not classifiable as an antibiotic, absent independent satisfaction of the criteria for such classification. The term "antibiotic" is commonly understood to mean the ability to kill or inhibit the growth of microorganisms. Because ADC-6 lacks the ability to kill bacteria or to inhibit bacterial growth, it is ineligible for classification as an antibiotic under the HTS. Customs' classification is affirmed; judgment will be entered accordingly.

TORRINGTON CO., PLAINTIFF-APPELLANT, AND FEDERAL-MOGUL CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT-APPELLEE, AND SKF USA INC. AND SKF (U.K.) LTD., DEFENDANTS-APPELLEES

Appeal No. 94–1117

(Decided January 13, 1995)

Terence P. Stewart, Stewart & Stewart, of Washington, DC, argued for plaintiff-appellant. With him on the brief were *James R. Cannon, Jr.* and *Patrick J. McDonough.* Of counsel was *Myron A. Brilliant.*

Velta A. Melnbrencis, Assistant Director. Commercial Litigation Branch, Department of Justice, of Washington, DC, argued for defendant-appellee. With her on the brief were *Frank W. Hunger,* Assistant Attorney General and *David M. Cohen,* Director. Also on the brief were *Stephen J. Powell,* Chief Counsel for Import Administration, *Berniece A. Browne,* Senior Counsel and *Dean A. Pinkert,* Attorney-Advisor, Office of the Chief Counsel for import Administration, U.S. Department of Commerce, of counsel. *Herbert C. Shelley,* Howrey & Simon, of Washington, DC, argued for defendants-appellees. With him on the brief was *Alice A. Kipel.*

Appealed from: U.S. Court of international Trade.
Judge TSOUCALAS.

Before ARCHER, *Chief Judge,* RADER, and SCHALL, *Circuit Judges.*

RADER, *Circuit Judge.*

The Torrington Company (Torrington) appeals the judgment of the United States Court of International Trade rejecting Torrington's and Federal-Mogul Corporation's challenge to an antidumping administrative review. *Torrington Co. v. United States,* 824 F. Supp. 1095 (Ct. Int'l Trade 1993) *(Torrington I), after remand,* No. 91–08–00570, Slip. Op. 93–199 (Ct. Int'l Trade Oct. 14, 1993) *(Torrington II).* The Court of International Trade refused to reach Torrington's challenge to the International Trade Administration's (ITA) method of calculating the assessment rate and cash deposit rate for imported merchandise because it was moot. The Court of International Trade also affirmed ITA's decision to adjust the foreign market value of the bearings for imputed inventory carrying costs. This court affirms.

BACKGROUND

Antidumping laws protect domestic industries from actual, or likely, sales of imported goods at less than fair value 19 U.S.C § 1673.[1] When the International Trade Commission finds that imports injure or threaten to injure United States industry, Title 19 authorizes imposition of a special duty on such imported goods. This antidumping duty equals the amount by which the foreign market value of the merchandise exceeds the United States price *Id.*

ITA, an agency of the Department of Commerce, determines the foreign market value and the United States price of imported products foreign market value generally refers to the price of the merchandise in the home market of the exporting foreign country 19 U.S.C. § 1677b(a)(1)(A). In the absence of sufficient home market sales, ITA bases foreign market value on either the sales price in countries other than the United States, 19 U.S.C. § 1677b(a)(1)(B), or a "constructed value," 19 U.S.C. § 1677b(a)(2).

ITA calculates United States price in terms of (i) the purchase price or (ii) the exporter's sales price. 19 U.S.C. § 1677a. Purchase price sales occur between a foreign manufacturer and an independent United States importer. Purchase price is the "actual or agreed-to price between the foreign producer and the independent importer, prior to the time of importation." *Smith-Corona Group v. United States,* 713 F.2d 1568, 1572, 1 Fed. Cir. (T) 130, 133 (1983), *cert. denied,* 465 U.S. 1022 (1984); 19 U.S.C. § 1677a(b). Exporter's sales price sales, on the other hand, occur between a foreign manufacturer and its related importer, such as a United States subsidiary. Exporter's sales price is "the price at which the foreign manufacturer or its agent sells or agrees to sell the merchandise in the United States." *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States,* 13 F. 3d 398, 399 n.2, ___ Fed. Cir. (T) ___, ___, (1994) (citing *Zenith Elecs. Corp. v. United States,* 988 F.2d 1573, 1577, ___ Fed. Cir. (T) ___, ___ (1993)); 19 U.S.C. § 1677a(c). To calculate exporter's sales price, ITA first measures the price at which goods are ultimately resold to an independent party in the United States. This price is then subject to several mandatory statutory adjustments to arrive at exporter's sales price. Thus, as with purchase price sales, ITA arrives "at a United States price that reflects the price that the [goods] would command in 'an arms-length transaction, whether from the importer to an independent retailer or directly to the public.'" *Koyo Seiko, Co. v. United States,* 36 F.3d 1565, 1567, ___ Fed. Cir. (T) ___, ___ (1994) (quoting *Smith-Corona,* 713 F.2d at 1572).

"To ensure that the quantum of antidumping duties is calculated in a fair manner," ITA adjusts both foreign market value and United States price. *Koyo Seiko,* 36 F.3d at 1568.

> Foreign market value and United States price represent prices in different markets affected by a variety of differences in the chain of

[1] All citations to the United States Code refer to the 1988 edition, unless otherwise indicated.

> commerce by which the merchandise reached the export or domestic market. Both values are subject to adjustment in an attempt to reconstruct the price at a specific, "common" point in the chain of commerce, so that value can be fairly compared on an equivalent basis. While the statute does not specify *where* in the chain of commerce price is constructed, the specific statutory adjustments appear to indicate an 'f.o.b. foreign port' price.

Smith-Corona, 713 F.2d at 1571–72 (emphasis in original); *see* 19 U.S.C. § 1677a(d) (adjustments applicable to both purchase price and exporter's sales price); 19 U.S.C. § 1677a(e) (adjustments applicable to exporter's sales price); 19 U.S.C. § 1677b(a)(4) (adjustments applicable to foreign market value).

After making these price adjustments, ITA calculates the dumping margin by subtracting the United States price from the foreign market value. 19 U.S.C. § 1675(a)(2). The dumping margin provides the basis for assessment of antidumping duties. It also provides the basis for cash deposits of estimated duties for future entries. *Id.*

The antidumping duty order at issue covers imports of antifriction bearings from the United Kingdom. *Ball Bearings and Cylindrical Roller Bearings and Parts Thereof from the United Kingdom*, 54 Fed. Reg. 20,910 (Dep't Comm. 1989). SKF (U.K.) Ltd. exported goods covered by the duty order from the United Kingdom, and SKF USA Inc. sold them in the United States. *Id.* SKF (U.K.) Ltd. and SKF USA Inc. are defendant intervenors in this case.

ITA initiated its first administrative review of the order on June 11, 1990. *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom*, 55 Fed. Reg. 23,575 (Dep't Comm. 1990) (initiation of antidumping admin. reviews). This review covered antifriction bearings imported between November 9, 1988 and April 30, 1990. *Id.* ITA published its preliminary determination on March 15, 1991. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the United Kingdom*, 56 Fed. Reg. 11,197 (Dep't Comm. 1991) (preliminary results of antidumping duty admin. reviews) *(Preliminary Results)*. On July 11, 1991, ITA reported the final results of its administrative review *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof From the United Kingdom*, 56 Fed. Reg. 31,769 (Dep't Comm. 1991) (final results of antidumping duty admin. reviews) *(Final Results)*.

ITA calculated duty assessment rates for exporter's sales price sales during the period of review and cash deposit rates for estimated duties on future entries *Final Results*, 56 Fed. Reg. at 31,771–72. ITA based both calculations on potential uncollected dumping duties (PUDD), measured generally as the difference between foreign market value and United States price. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany*, 56 Fed. Reg. 31,692, 31,698 (Dep't Comm. 1991) (final results of antidump-

ing duty admin. review) *(Issues Appendix)* (explaining how ITA calculated assessment rate and cash deposit rate).[2] ITA did not, however, use the same method to calculate duty assessment rates and cash deposit rates. *Final Results,* 56 Fed. Reg. at 31,771–72. ITA calculated the assessment rate for exporter's sales price sales by dividing the total PUDD for each importer by the *total entered value* of its reviewed sales. *Id.* To compute the cash deposit rate, however, ITA divided the total PUDD for each exporter by the *total United States price value* for that exporter's sales during the review period. *Id.* In sum, ITA calculated the assessment rate as a percentage of entered value and the cash deposit rate as a percentage of United States price ITA explained this difference

> Section 731 of the Tariff Act [19 U.S.C. § 1673] defines an antidumping duty as the amount by which foreign market value exceeds United States price. As the Department has stated on numerous occasions, duty deposits are merely *estimates* of future dumping liabilities

Issues Appendix, 56 Fed. Reg. at 31,699 (emphasis added).

To arrive at the appropriate assessment and cash deposit rates, ITA first had to calculate the United States price and the foreign market value. When calculating the United States price based upon exporter's sales price transactions, ITA adjusted the exporter's sales price for inventory carrying costs. ITA also made a corresponding deduction to the foreign market value. *Issues Appendix,* 56 Fed. Reg. at 31,727; *see Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From United Kingdom,* 56 Fed. Reg. 11,197 (Dep't Comm. 1991) (prelim. results of antidumping duty admin. review). ITA measured the inventory carrying costs from the date the exporter completed production of the merchandise. *Issues Appendix,* 56 Fed. Reg. at 31,727.

ITA made these parallel deductions from the foreign market value and the exporter's sales price to ensure a fair price comparison. *Id.* As to the United States price, ITA explained:

> [ITA] adjusts for inventory carrying costs on U.S. sales through imputation because the actual financial cost, for the time between shipment from the parent and payment by the related importer, is generally borne by the foreign parent. Therefore the cost will not be found on the books of the importer, but submerged in the accounts of the parent with other financial costs. As a result, some of the selling expenses associated with the U.S. sales are not directly identifiable.

Id. As to foreign market value. ITA continued:

> Similarly, in the home [foreign) market, although the actual cost of carrying inventory is on the books of the seller, it will be commingled with all other interest expenses, and classified as a general and administrative expense rather than as a selling expense. As is the case for the U.S sales, the actual amount is not identifiable.

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[2] The International Trade Administration (ITA) had before it concurrent administrative reviews of imports of antifriction bearings from nine countries, including the United Kingdom. ITA held a hearing on general issues pertaining to all nine administrative reviews. ITA then published the results of these hearings in the *Issues Appendix.*

> Therefore, it is appropriate to impute this cost in both markets, since the nature of the expense is the same, and the same difficulty exists in determining the actual costs in each market.

Id.

The Court of International Trade rejected Torrington's challenge to ITA's method of calculating cash deposit rates differently from assessment rates. *Torrington I*, 824 F. Supp. at 1097–98. The Court of International Trade found that ITA's subsequent publication of superseding cash deposit rates made the deposit issue moot. *Id.* at 1098. In addition, the court referred to its decision in *Federal-Mogul Corp. v. United States*, 813 F. Supp. 856, 866–68 (Ct. Int'l Trade 1993), supporting the reasonableness of ITA's cash deposit rate calculation. *Torrington I*, 824 F. Supp. at 1098. The Court of International Trade also affirmed ITA's adjustment to foreign market value for imputed inventory carrying costs under 19 C.F.R. § 353.56(b)(2) (1991). *Id.* Torrington appeals both issues to this court.

DISCUSSION

This court reviews ITA's interpretation of the antidumping laws *de novo*. *Koyo Seiko*, 36 F.3d at 1570. In conducting that review, however, this court defers to ITA's statutory interpretation where the statute is silent or ambiguous on the disputed issue. *Id.*; *see Daewoo Elecs. Co. v. United States*, 6 F.3d 1511, 1516, ___ Fed. Cir. (T) ___, ___ (Fed. Cir. 1993) (this court reviews whether ITA's interpretation of a statutory provision falls within the range of permissible construction), *cert. denied*, 114 S. Ct. 2672 (1994); *Zenith Elecs.*, 988 F.2d at 1583 (reviewing whether "Commerce applied a reasonable interpretation of the statute in this case").

I. CASH DEPOSIT RATES

A court with jurisdiction under Article III of the Constitution will not decide cases that are moot because of an absence of "subject matter on which the judgment of the court can operate." *Ex Parte Baez*, 177 U.S. 378, 390 (1900). A claim is not moot, however, if the action "originally complained of is 'capable of repetition, yet evading review.'" *Honig v. Doe*, 484 U.S. 305, 318 (1988) (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982)); *Southern Pac. Terminal Co. v. Interstate Comm. Comm'n*, 219 U.S. 498, 515 (1911). To qualify for this exception, the challenged action must meet two conditions. First, the action must "in its duration [be] too-short to be fully litigated prior to its cessation or expiration." *Cambridge Lee Indus., Inc. v. United States*, 916 F.2d 1578, 1581 (Fed. Cir. 1990) (quoting *Weinstein v. Bradford*, 423 U.S. 147 (1975)). Second, there must be "a 'reasonable likelihood' that the party 'will again suffer the [injury] that gave rise to the suit.'" *Cambridge*, 916 F.2d at 1581 (quoting *Honig*, 484 U.S. at 318).

The Trade Agreements Act of 1979, 19 U.S.C. §§ 2501–2582 (1988 & Supp. V 1993), authorizes ITA to conduct annual administrative reviews of dumping findings upon the request of an interested party. *See* 19 U.S.C. § 1675(a). During such a proceeding, ITA reviews the esti-

mated antidumping duty and determines the actual antidumping duty for the prior review period. The administrative review effectively updates the antidumping duty order. Under ITA's administrative practice, ITA can publish superseding cash deposit rates as frequently as once per year, as a result of successive administrative reviews

ITA thus can impose a new cash deposit rate before interested parties can fully litigate the method of calculating the cash deposit rate for the prior administrative review. This situation arose in this case. By the time this court heard oral argument in this case, opportunity for three administrative reviews had overtaken the events and a fourth was imminent. *See, e.g., Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France,* 57 Fed Reg. 28,360 (Dep't Comm. 1992) (final results of antidumping duty admin. reviews); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom,* 58 Fed. Reg. 39,729 (Dep't Comm. 1993) (final results of antidumping duty admin. reviews); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom,* 59 Fed. Reg. 32,180 (Dep't Comm. 1994) (initiation of antidumping duty admin. reviews).

The record shows that litigation cannot keep pace with the rate of administrative reviews. ITA calculates a new cash deposit rate before full adjudication of the old rate can take place. In addition, a reasonable likelihood exists that Torrington—currently an active participant in antidumping duty litigation—will face the same cash deposit rate issue again. Therefore, this question falls within the exception to the mootness doctrine for recurring, short-term conduct. *Honig,* 484 U.S. at 318. The trial court erred in declaring the cash deposit rate issue moot.

Because the issue is ripe-for adjudication, this court turns to the merits of that question. Calculation of cash deposit rates and assessment rates during an administrative review must comply with 19 U.S.C. § 1675(a)(2):

> For the purpose of [reviewing and determining the amount of any antidumping duty during a section 1675(a)(1) annual administrative review], the administering authority shall determine—
>
> (A)the foreign market value and United States price of each entry of merchandise subject to the antidumping duty order and included within that determination, and
>
> (B)the amount, if any, by which the foreign market value of each such entry exceeds the United States price of the entry
>
> The administering authority * * * shall publish notice of the results of the determination of antidumping duties * * * and *that determination shall be the basis for the assessment of antidumping duties on entries of the merchandise included within the determination and for deposits of estimated duties.*

Id. (Emphasis added.)

Section 1675(a)(2) does not require the same method of calculation for assessment rates and cash deposit rates. Nor does it specify a particular divisor when calculating either assessment rates or cash deposit rates. Rather, the statute merely requires that PUDD, the difference between foreign market value and United States price, serve as the basis for both assessed duties and cash deposits of estimated duties. ITA based its calculation of both rates on PUDD. Thus, ITA's use of different methods for calculating these rates does not conflict with the statute.

Moreover, Title 19 bases the cash deposit rate on *estimated* antidumping duties on future entries. *See* 19 U.S.C. § 1673f (providing for refund or collection of over- and under-payments of estimated duty deposits); 19 U.S.C. § 1673b(d)(2) (administering authority must order posting of a cash deposit equal to the "estimated average amount by which the foreign market value exceeds the United States price"); 19 U.S.C. § 1673e(a)(3) (administering authority must publish an order requiring "the deposit of estimated antidumping duties"). Thus, Title 19 requires only cash deposit estimates, not absolute accuracy. These estimates need only be reasonably correct pending the submission of complete information for an actual and accurate assessment. *See* H.R. Rep. No. 317, 96th Cong., 1st Sess. 69 (1979).

Finally, ITA's use of the total United States price, instead of entered value, as a divisor to calculate cash deposit rates does not result in consistent underpayment of estimated duties. Statutory United States price, in this case exporter's sales price, is subject to both upward and downward adjustment, depending on many factors. *Zenith Elecs.*, 988 F.2d at 1577. This calculation may change between administrative reviews. It is "by no means true" that "future [United States price] will be the same as current [United States price] and will always be greater than entered value." *Federal-Mogul*, 813 F. Supp. at 868. ITA cannot predict whether use of the entered value for any given review period would produce a more accurate cash deposit rate. No evidence compels this court to find that deriving cash deposit rates from entered values leads to a more accurate estimation of future duties than reliance on total United States price.

ITA followed the statute in arriving at estimated duties. This court agrees with the Court of International Trade that ITA did not err by basing cash deposit rates on statutory United States price instead of entered Customs value.

II. Inventory Carrying Costs

The remaining issue is whether ITA properly deducted inventory carrying costs from foreign market value as an indirect selling expense. ITA may adjust exporter's sales price and foreign market value for indirect selling expenses. Indirect selling expenses are those expenses that do not vary with the quantity sold. *Koyo Seiko*, 36 F.3d at 1569 n.4. Title 19 permits ITA to deduct indirect selling expenses from exporter's sales price. Specifically, section 1677a(e)(2) encompasses indirect selling

expenses incurred by a foreign manufacturer on behalf of its related United States importer:

> [T]he exporter's sales price shall also be adjusted by being reduced by the amount, if any, of—
>
> * * * * * * *
>
> (2)expenses generally incurred by or for the account of the exporter in the United States *in selling* identical or substantially identical merchandise * * *.

19 U.S.C. § 1677a(e)(2) (emphasis added); *see also* 19 U.S.C. § 1677(13) ("exporter" includes the related United States importer).

Commerce, perceiving unfairness in allowing a deduction for indirect selling costs from exporter's sales price and not from foreign market value, promulgated 19 C.F.R. § 353.15(c) (1980), now codified at 19 C.F.R. § 353.56(b). This regulation permits ITA to deduct indirect selling expenses from foreign market value:

> In comparisons with exporter's sales price, the Secretary will make a reasonable deduction from foreign market value for all expenses * * * incurred in selling such or similar merchandise up to the amount of the expenses * * * incurred in selling the merchandise.

19 C.F.R. § 353.56(b)(2).[3] This special adjustment to foreign market value, applicable in exporter's sales price transactions, is known as the exporter's sales price offset, or "ESP offset." *See Smith-Corona*, 713 F.2d at 1577–79.

Although not specifically authorized by statute,[4] this court has held the ESP offset valid as a reasonable exercise of the Secretary of Commerce's authority to administer the antidumping laws fairly. *Smith-Corona*, 713 F.2d at 1579. The ESP offset enables a *"fair* comparison between foreign and domestic market prices or values." *Consumer Prods. Div. v. Silver Reed Am., Inc.*, 753 F.2d 1033, 1037, 3 Fed. Cir. (T) 83, 87 (1985); *see also Koyo Seiko*, 36 F.3d at 1574 ("[B]ecause indirect expenses were allowed to be deducted from exporter's sales price, Commerce may properly offset that deduction by a similar deduction from foreign market value as well.")

In this administrative review, ITA determined that inventory carrying costs are indirect selling expenses deductible from exporter's sales price and foreign market value. ITA deducted inventory carrying costs from exporter's sales price under section 1677a(e)(2). *Issues Appendix*, 56 Fed. Reg. at 31,727. For exporter's sales price transactions, ITA made a parallel deduction from foreign market value *Id.* Furthermore, ITA measured inventory carrying costs from the date of production.

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[3] The language of this regulation was originally published in 1976 and codified at 19 C.F.R. § 153.10(1976) (last sentence). 41 Fed. Reg. 26,204 (1976). Following the Trade Agreements Act of 1979, ITA published new regulations relating to antidumping duties. New regulation 19 C.F.R. § 353.15 retained the substance of 19 C.F.R. § 153.10. 45 Fed. Reg. 8,185 (1980).

[4] The ESP offset is not a "circumstance of sale" adjustment authorized under 19 U.S.C. § 1677b(a)(4)(B). *See Smith-Corona Group v. United States*, 713 F.2d 1568, 1579 (Fed. Cir. 1983) (the ESP offset is not "based on *differences* in the circumstances of sale but, rather on similarities.") (emphasis in original).

ITA's practice was a reasonable exercise of ITA's discretion in administering the antidumping laws. In another proceeding involving the same issue, ITA reasoned:

> While the Department's original adjustment for inventory carrying costs may have been motivated by concerns that costs normally borne by a U.S. subsidiary could be shifted to the foreign parent, in order for comparisons to be fair, it is necessary to make similar adjustments to foreign market value. That the foreign seller chooses to sell from inventory in the home market is no different from a seller's decision to undertake ESP transactions in the United States. *Because the seller incurs the opportunity cost of holding inventory in both markets, and because we adjust for that cost in the U.S. market, we must also adjust for the same cost in the home market.*
>
> * * * * * * *
>
> Ideally, we would start at the point where home market and U.S. merchandise are separated, *i.e.,* the last common point of the production/distribution chain for home market and U.S. merchandise. In many cases, such as in these investigations, this will be when the merchandise rolls off the production line.

Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof, From the Federal Republic of Germany, 54 Fed. Reg. 18,992 19,050 (Dep't Comm. 1989) (final determination of sales at less than fair market value) (emphasis added); *see also Industrial Phosphoric Acid from Belgium,* 52 Fed. Reg. 25,436, 25,439 (Dep't Comm. 1987) ("Inventory is held from the time of production to sale. Accordingly, it is appropriate to calculate the inventory carrying costs from the date of production."); *Antidumping Duties,* 54 Fed. Reg. 12,742, 12,769 (Dep't Comm. 1989) (ITA's revision of regulation 353.56(b)(2) clarifies that "the indirect selling expenses, whether incurred in the United States or elsewhere, may be offset by indirect selling expenses incurred on sales of such or similar merchandise regardless of where incurred").

ITA's practice of deducting inventory carrying costs, measured from the production date, from exporter's's sales price and foreign market value comports with section 1677a(e)(2) and regulation 353.56(b)(2). This practice also affords a true "apples-to-apples" comparison. *See Smith-Corona,* 713 F.2d at 1579 The opportunity cost of holding inventory accrues from the production date and applies to both export and home market sales. ITA may fairly treat this opportunity cost as an indirect selling expense and thus deduct it from exporter's sales price and foreign market value.

Moreover, this court finds support for ITA's inventory carrying cost deductions in the United States international trade agreements. Congress enacted the Trade Agreements Act of 1979 to create a comprehensive antidumping statute. As part of the 1979 Act, Congress approved various trade agreements entered into during the Tokyo Round of Multilateral Trade Negotiations (1973–1979). 19 U.S.C. § 2503(a), (c); *see* 3 Joseph E. Pattison, *Antidumping and Countervailing Duty Laws*

§ 1.05[2] (1994). One such agreement was the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (the Revised GATT Antidumping Code). 19 U.S.C. § 2503(c)(6). The Revised GATT Antidumping Code, serves as a guide to interpretation of the antidumping laws to the extent it does not conflict with Title 19. 19 U.S.C. § 2504(a). Article 2, paragraph 6, of the Revised GATT Antidumping Code relates to the ESP offset:

> In order to effect a fair comparison between the export price and the domestic price in the exporting country (or the country of origin) * * * the two prices shall be compared at the same level of trade, normally at the exfactory level, and in respect of sales made at as nearly as possible the same time.

Revised GATT Antidumping Code, Article 2, ¶ 6, *reprinted in* Pattison, *supra,* App. E. Thus, the Revised GATT Antidumping Code also demands a fair comparison between foreign market value and exporter's sales price and recommends comparison at the date of production. ITA's reliance on the ESP offset to make parallel inventory carrying cost deductions thus comports with Title 19 which references the Revised GATT Antidumping Code.

ITA's interpretation of the adjustment provisions at issue is reasonable. *See Zenith Radio Corp. v. United States,* 437 U.S. 443, 450 (1978) (if Congress does not address precise question at issue, a court must defer to an agency's reasonable interpretation of a statute). Thus, this court affirms the decision of the Court of international Trade upholding that interpretation.

CONCLUSION

Although the Court of international Trade erred in holding moot the issue relating to calculation of the superseded cash deposit rate, the court correctly determined, by reference to *Federal-Mogul,* 813 F Supp. at 866–68, that ITA's use of different methods to calculate the assessment and cash deposit rates complied with statute. Thus, this court affirms the Court of International Trade's decision on this issue. This court also affirms the Court of International Trade's judgment upholding ITA's inventory carrying cost adjustment to foreign market value.

COSTS

Each party shall bear its own costs.

AFFIRMED

VAN DALE INDUSTRIES, PLAINTIFF-APPELLANT *v.*
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 94–1353

(Decided March 17, 1995)

Steven P. Florsheim, Grunfeld, DeSiderio, Lebowitz & Silverman, of New York, New York, argued for plaintiff-appellant.

Barbara Silver Williams, Attorney in Charge, International Trade Field Office, Department of Justice, of New York, New York, argued for defendant-appellee. *Frank W. Hunger*, Assistant Attorney General, *David M. Cohen*, Director, *Joseph I. Liebman*, Attorney and *Susan Bennett Mansfield*, Senior Trial Counsel, Department of Justice, of New York, New York, were on the brief for defendant-appellee.

Appealed from: U.S. Court of International Trade.
Chief Judge DICARLO.

Before MICHEL, *Circuit Judge*, SMITH, *Senior Circuit Judge*, and LOURIE, *Circuit Judge*.

MICHEL, *Circuit Judge*.

Van Dale Industries (Van Dale) appeals the April 1, 1994 decision of the Court of International Trade, slip opinion 94–54, granting summary judgment affirming the United States Customs Service classification under subheading 6109.10.00 of the Harmonized Tariff Schedule of the United States (HTSUS) of merchandise imported by Van Dale. Because Van Dale has not shown the female undershirts to not fit that classification or to better fit another, we affirm.

BACKGROUND

Van Dale imported women's or girls' underwear tops that cover the chest area, do not extend below the midriff of the wearer and do not provide support to the breasts. The Customs Service classified the merchandise under subheading 6109.10.00, HTSUS, which applies to "T-shirts, singlets, tank tops and *similar garments*" (emphasis added) at a rate of 21% *ad valorem*. Van Dale challenged that decision in the Court of International Trade which affirmed the classification.

Van Dale appealed to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5) (1388).

DISCUSSION

The broad issue presented by this case, the meaning of a Customs classification term, is a question of law reviewed by us *de novo* on appeal from a decision of the Court of International Trade. *Simod Am. Corp. v. United States*, 872 F.2d 1572. 1576, 7 Fed. Cir. (T) 82, 86 (1989). Because classification decisions of the Customs Service are presumed correct, the party challenging the classification carries the burden of proof in the trial court 28 U.S.C. § 2639(a)(1) (1988). As appellant here, Van Dale carries the burden of persuasion.

Van Dale contends that the Court of International Trade misapplied the principle of *ejusdem generis* in concluding that the merchandise was

properly classified as a garment "similar" to "T-shirts, singlets and tank tops." "As applicable to classification cases, *ejusdem generis* requires that the imported merchandise possess the essential characteristics or purposes that unite the articles enumerated: eo nomine in order to be classified under the general terms." *Sports Graphics, Inc. v. U.S.*, 24 F.3d 1390, 1392, ___ Fed. Cir. (T) ___ (1994). Van Dale argues that T-shirts, singlets and tank tops are united by the essential characteristic of being shirt-type garments whose length always extends downward to the waist or lower. as shown, Van Dale argues, by definitions and illustrations from *Webster's Third New International Dictionary* (1986), *The Fashion Dictionary* (1973) and *Fairchild's Dictionary of Fashion* (2d ed. 1988). According to Van Dale, because the merchandise does not extend to the waist, the Customs Service cannot properly classify it under subheading 6109.10.00, HTSUS.

We agree with the Court of International Trade that extending down at least to the waist is not an essential characteristic of the three exemplars, T-shirts, singlets and tank tops. Although the illustrations from the dictionaries cited by Van Dale show shirts of this length the definitions themselves do not impose such a restriction. Nor does any language in heading 6109, HTSUS.

The definitions cited by Van Dale do indicate, however, that T-shirts and singlets can be undershirts while tank tops are similar to undershirts An undershirt is defined as "a collarless undergarment with or without sleeves." *Webster's Ninth New Collegiate Dictionary* 1287 (1990). The dictionaries undercut a definition that would require undershirts to necessarily extend to the waist or below. The merchandise, however, certainly fits the *Webster* definition of undershirt, establishing that as an undershirt that covers the breasts and a bit below as well-as areas of the shoulders and back, the merchandise is "a similar garment" to the exemplars specified in heading 6109, HTSUS. Moreover, as to "purpose," like the exemplars the merchandise provides warmth and covering for modesty although not support to the breasts. We therefore conclude the Customs Service correctly classified the merchandise.

Van Dale contends that the merchandise is properly classifiable under subheading 6108.91.00, HTSUS, which applies to "women's or girls' slips, petticoats, briefs, panties, nightdresses, pajamas, negligees bathrobes, dressing gowns and similar articles." This classification carries the rate of 9% *ad valorem*. According to Van Dale, the exemplars are united by the fact that they cover a broad range of women's and girls' underwear garments and, therefore, heading 6108 includes all female underwear garments not specially provided for in some other tariff provision. However, because women's and girls' undershirts are provided for under heading 6109, HTSUS. the merchandise at issue need not fall into any broader categories such as heading 6108. Van Dale's preferred provision, much less its fall back provision, the catch-all subheading

6114.20.00, HTSUS, for "other garments, knitted or crocheted * * * cotton" at 11.5% *ad valorem*.[1]

That Van Dale must pay far higher duties on its imported merchandise under heading 6109, HTSUS, than under 6108 or 6114 is a consequence not of improper classification by the Customs Service, but choices by the Congress. We have no warrant, given this specific garment, to undo the decision of either.

CONCLUSION

Because we hold the merchandise at issue as an undershirt is similar to the T-shirts, singlets and tank tops listed as exemplars under heading 6109, HTSUS, the Customs Service properly classified the merchandise under that provision. Therefore the decision of the Court of International Trade so holding is

AFFIRMED.

[1] On appeal, Van Dale does not raise the argument, made before the Court of International Trade, that the merchandise is properly classifiable under heading 6212, HTSUS, as "brassieres, girdles corsets, braces, suspenders, garters and similar articles."

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 95–161)

IKO INDUSTRIES LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 91–06–00451

Plaintiff moves for summary judgment, challenging Customs' classification of paper-based, asphalt roll-roofing under subheading 6807.10.00, HTSUS, and paper-based, asphalt shingles under subheading 6807.90.00, HTSUS. Plaintiff claims the merchandise is properly classifiable under subheading 4811.10.00, HTSUS.

Held: Plaintiff has overcome the presumption of correctness attached to Customs' classification of the subject merchandise under subheadings 6807.10.00 and 6807.90.00, HTSUS, and has demonstrated the merchandise is properly classifiable under subheading 4811.10.00, HTSUS. The Court will enter judgment for plaintiff.

(Dated September 19, 1995)

Fitch, King & Caffentzis (James Caffentzis), for plaintiff.

Frank W. Hunger, Assistant Attorney General of the United States; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(John J. Mahon); Edward N. Maurer,* Office of the Assistant Chief Counsel, United States Customs Service, of Counsel, for defendant.

OPINION

CARMAN, *Judge:* Plaintiff commenced this action to challenge the United States Customs Service's (Customs) classification and liquidation of certain merchandise plaintiff imported from Canada during 1989 and 1990 through various ports of entry within the customs districts of Ogdensburg, New York and Great Falls, Montana. The Court designated this action a test case pursuant to U.S. CIT R. 84(b) and entered an order to that effect on February 22, 1993. The Court has jurisdiction under 28 U.S.C. § 1581(a) (1988) and, for the reasons which follow, enters judgment for plaintiff.

BACKGROUND

There are two types of products at issue in this case: paper-based, asphalt roll roofing (roll roofing) and paper-based, asphalt shingles (shingles). There are three types of roll roofing involved in this case:

smooth surface, mineral surface, and selvage. (Stipulation ¶ B.2.) There are ten varieties of the subject shingles: Aristocrat, AM Armour Seal 20, Chateau, New Englander, Total Seal, Armour Seal Supreme, Armour Lock, Economy Seal, Supreme, and Super Seal. *(Id.* ¶ B.5.) With the exception of Armour Lock, which is non-rectangular, and Chateau which is imported into the United States in 37.2 cm by 100 cm strips, all of the shingles are imported into the United States in rectangular strips measuring 33.6 cm by 100 cm. *(Id.* ¶ B.6.) The shingles are imported in bundles of 21 or 22 shingles and each shingle, except for Chateau, New Englander, and Total Seal, is cut on one side, creating a tab effect. *(Id.* ¶¶ B.7, 8.) The shingles vary from each other by weight, shape, and color, with the differences in physical characteristics affecting the durability of the shingles. *(Id.* ¶ B.10.)

The roll roofing and shingles are part of a class of articles used in the United States as exterior covers for roofs to protect against damage from water or other environmental factors. *(Id.* ¶¶ B.4, 9, 18.) The shingles are generally "used on a sloping roof with a pitch greater than two inches per foot." *(Id.* ¶ B.19.) The roll roofing is principally used to cover horizontal or slightly sloped roof surfaces. *(Id.* ¶¶ B.4, 20.)

The roll roofing and shingles are manufactured by a continuous process. *(Id.* ¶ B.11.) The process commences by matting "fibers from recycled waste paper and wood chips, onto a single cylinder former." *(Id.)* After a felt blanket carries the mat from the cylinder, the mat is pressed to remove the water, and then dried by passing through a series of steam heated cylinders. *(Id.)* After this process, generally known as the "Fourdrinier" process, is complete, the resulting paper felt is transferred to the roofing plant. *(Id.)* At the roofing plant, the paper felt is "unwound on a dry looper and dipped into a [saturator] tank of hot liquid asphalt." *(Id.)* Once the product leaves the saturator tank, it "enters a wet looper which draws the asphalt from its surface into the felt to obtain a higher degree of saturation." *(Id.)*

To produce the various types of roll roofing, the paper felt is first coated on both sides with asphalt after the above process is complete. *(Id.* ¶ B.12.) The asphalt gives the product water-proofing capabilities. *(Id.* ¶ B.16.) Depending on the type of roll roofing being produced, the surface that will be exposed to the elements and the other side of the coated paper felt is covered as follows:

Roll roofing type	Exposed side	Non-exposed side
Smooth surface	Sand	Talc
Mineral surface	Mineral granules[1]	Fine sand or talc
Selvage	Mineral granules	Fine sand or talc[2]

(Id. ¶ B.12(i)–(iii).) The substrate is the carrier for the asphalt and/or granules and acts as a reinforcement for the merchandise. *(Id.* ¶ B.17.)

[1] "Granules are used on the surface of roll roofing and shingles which will be exposed to the natural elements * * * [to] [p]rotect underlying asphalt from the sun's rays [and to provide] additional fire resistance." *(Id.* ¶ B.15.)

[2] The non-exposed half surface may or may not be coated with asphalt. *(Id.* ¶ B.12(iii).)

After the surfaces are covered with the various materials, the sheets move to a looper and winder to be cooled, cut, usually in widths of 91.5 cm and lengths of 11 meters. *(Id.* ¶ B.13.) The finished roll is then banded and packaged. *(Id.)*

Shingles are produced by coating the paper felt on both sides with asphalt, coating the exposed side with mineral granules and the non-exposed side with fine sand or talc. *(Id.* ¶¶ B.12, 12(ii), 14.) The sheet is then cut into the desired shapes, with small slits usually cut on one side of the shingle, and bundled. *(Id.* ¶ B.14.)

Customs classified plaintiff's roll roofing under subheading 6807.10.00, Harmonized Tariff Schedule of the United States (HTSUS), and the shingles under subheading 6807.90.00, HTSUS. Plaintiff filed a timely protest on April 18, 1991, to challenge Customs' classification. On May 1, 1991, Customs denied the protest and, after having paid all liquidated duties, plaintiff commenced this action. The parties subsequently filed a joint stipulation containing agreed facts and requested this action be submitted for decision on the stipulation in lieu of a trial. The Court accordingly treats this as a motion for summary judgment.

In a response brief submitted pursuant to the stipulation, however, defendant requested a remand to determine whether the classification of the roll roofing and shingles at issue in this case was affected by *Washington Int'l Ins. Co. v. United States* 12 Fed. Cir. (T) ____, 24 F.3d 224, *aff'g* 16 CIT 873, 803 F. Supp. 420 (1992).[3] This Court ordered a remand on August 9, 1994. In its remand determination, Customs reaffirmed its classification of the merchandise under subheadings 6807.10.00 and 6807.90.00, HTSUS. This Court now considers the merits of this action.

TARIFF PROVISIONS AND CHAPTER NOTE

Classified Under:[4]

6807	Articles of asphalt or of similar material (for example, petroleum bitumen or coal tar pitch):
6807.10.00	In rolls * * *
6807.90.00	Other * * *

Claimed Under:

4811	Paper, paperboard, cellulose wadding and webs of cellulose fibers, coated, impregnated, covered, surface-colored, surface-decorated or printed, in rolls or sheets, other than goods of heading 4803, 4809, 4810 or 4818:
4811.10.00	Tarred, bituminized or asphalted paper and paperboard * * *

[3] The Court in *Washington International Insurance* held the bitumen at issue was a "synthetic plastics material" within the meaning of the Tariff Schedules of the United States (TSUS). *Washington Int'l Ins.*, 16 CIT at 877, 803 F. Supp. at 424. In its request for a remand, defendant argued a remand was appropriate for Customs to determine the impact of *Washington International Insurance*, and to determine if the merchandise in this case is a synthetic plastics material classifiable under subheading 3921.90.40, HTSUS.

[4] All of the HTSUS provisions cited by the Court appear in HTSUS (1st ed. 1989 & 2d ed. 1990 & Supp. 1 & 2).

Relevant Chapter Note:

CHAPTER 68

ARTICLES OF STONE, PLASTER, CEMENT, ASBESTOS, MICA OR SIMILAR MATERIALS

Notes

1. This chapter does not cover:

* * * * * * *

(b) Coated, impregnated or covered paper of heading 4810 or 4811 (for example, paper coated with mica powder or graphite, bituminized or asphalted paper)[.]

CONTENTIONS OF THE PARTIES

Plaintiff contends the roll roofing and shingles are paper products properly classifiable under subheading 4811.10.00, HTSUS. Plaintiff points to the language of HTSUS General Rule of Interpretation (GRI) 1 which indicates "classification shall be determined according to the terms of the headings and any relative section or chapter notes." Subheading 4811.10.00, plaintiff argues, encompasses a variety of asphalted papers traditionally recognized as classifiable by the composition of the base felt. Plaintiff reasons the merchandise at issue is manufactured by a conventional paper-making process and formed by paper machinery, rendering the goods paper or paper products. The asphalt and mineral granules, plaintiff argues, do not transform the paper products, but instead are mere components. Furthermore, plaintiff contends, the statutory notes to Chapter 48 and Chapter 68 require classification of the roll roofing and shingles in Chapter 48. In support of this argument, plaintiff points to HTSUS Chapter 68, Note 1(b) which states Chapter 68 "does not cover * * * [c]oated, impregnated or covered paper of heading 4810 or 4811 (for example, paper coated with mica powder or graphite, bituminized or asphalted paper)[.]"

Plaintiff also contends defendant erroneously relied on the Customs Co-Operation Council's *Harmonized Commodity Description and Coding System Explanatory Notes (Explanatory Notes)*[5] to classify the merchandise at issue. Resort to the *Explanatory Notes* is not mandatory, and, in the instant case, plaintiff argues, the *Explanatory Notes* "conflict with the clear and unambiguous language of the statute." (Pl.'s Br. at 3–4.) Thus, plaintiff urges this Court not to allow defendant "to override the express language of the chapter notes and headings mandating classification in Chapter 48." *(Id.* at 9.)

Defendant contends Customs properly classified the subject imports under subheadings 6807.10.00 and 6807.90.00, HTSUS. Defendant maintains that although the goods at issue appear to fit the descriptions of subheading 4811.10.00 as well as subheadings 6807.10.00 and

[5] "The Explanatory Notes constitute the Customs Cooperation Council's official interpretation of the Harmonized System." H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582.

6807.90.00, a functional analysis reveals the goods have been so heavily coated or covered with asphalt and mineral granules that they are no longer coated paper. Instead, defendant argues, the goods are asphalt articles whose properties have been enhanced by a paper substrate, and, consequently, the paper component cannot determine classification.

Defendant further urges this Court to turn to the *Explanatory Notes*. Defendant points to the *Explanatory Notes* of Chapter 48 and argues the merchandise at issue does not compare to the exemplars listed, "nor are its coatings used for the same kinds of purposes indicated by the *Notes* * * *. The coating is not for the purpose of giving the *paper* some special quality, the presence of the paper is to give the asphalt special qualities * * *." (Def.'s Br. at 16.) Defendant also points to the *Explanatory Notes* of Chapter 68, which state Heading 68.07 includes:

> Roofing boards consisting of a substrate (e.g., of paperboard, of web or fabric of glass fibre, of fabric of man-made fibre or jute, or of aluminum foil) completely enveloped in, or covered on both sides by, a layer of asphalt or similar material.

According to defendant, "'roofing boards' refers to any kind of roofing material that satisfies the description contained in that *Note* * * *. The *Note* makes clear that the paper is a substrate—a support—for an asphalt article." (Def.'s Br. at 17.) In sum, defendant argues, when one reads the *Explanatory Notes* to Chapters 48 and 68 together, if a coating or covering is applied to paper to provide a new paper surface to render it suitable for special requirements, the merchandise falls under 4810 or 4811, HTSUS. If, however, application of the layer renders the paper a support for a product of the coating material, the product is properly classifiable under 6807, HTSUS.

Finally, defendant calls the Court's attention to advertising literature provided by plaintiff. According to defendant, the literature focuses on the provision of protection from water and the elements and does not mention the paper or any special characteristic thereof.

Plaintiff maintains that contrary to defendant's contentions, reference in the *Explanatory Notes* to "coated paper" has no application to the subject paper products. To qualify as "coated paper," plaintiff argues, the coating material must create a layer on the surface of the paper, which may be more or less substantial depending upon the paper's use. If defendant's theory is accepted, plaintiff reasons, "immeasurable groups and sub-groups of coated, covered or impregnated papers would be created. The statutory language, which clearly encompasses the asphalted coated papers in this case, would be supplanted by a test which is not recognized in commerce or industry." (Pl.'s Br. at 13.) Plaintiff also disputes defendant's contention that the subject goods are "roofing boards" as described in the *Explanatory Notes*.

STANDARD OF REVIEW

As in all customs classification cases, the government's classification decision is presumed to be correct. 28 U.S.C. § 2639(a)(1) (1988). This statutory presumption "governs all classification cases regardless of

whether the Court conducts a trial or considers a motion for summary judgment." *Ugg Int'l, Inc. v. United States*, 17 CIT 79, 82, 813 F. Supp. 848, 851 (1993). To obtain judgment as a matter of law, plaintiff must overcome the statutory presumption of correctness attached to Customs' classification. *Id.* at 83, 813 F. Supp. at 852 (citation omitted). To determine whether an importer has overcome the statutory presumption, the Court "must consider whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 2 Fed. Cir. (T) 70, 75, 733 F.2d 873, 878 (1984).

DISCUSSION

This case is before the Court on motion for summary judgment. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." U.S. CIT R. 56(d). "The Court will deny summary judgment if the parties present a dispute about a fact such that a reasonable trier of fact could return a verdict against the movant." *Ugg Int'l*, 17 CIT at 83, 813 F. Supp. at 852 (quotation marks and citation omitted).

The parties' stipulation defines the goods at issue. This case does not present any genuine issue of material fact. The two issues that remain are: (1) whether the paper-based asphalt roll roofing is an article of asphalt in rolls, as classified by Customs, or asphalted paper in rolls as claimed by plaintiff; and (2) whether the paper-based asphalt shingles are articles of asphalt, as classified by Customs, or asphalted paper in sheets, as claimed by plaintiff. Because these issues pertain solely to matters of statutory interpretation, specifically the proper meaning of the tariff provisions advanced by the parties, the Court concludes the parties' conflict raises questions of law which the Court may properly resolve by summary judgment. *Digital Equip. Corp. v. United States*, 8 Fed. Cir. (T) 5, 6, 889 F.2d 267, 268 (1989) (citation omitted).

Defendant has classified the roll roofing under subheading 6807.10.00, HTSUS, "Articles of asphalt or of similar material * * * In rolls," and the shingles under subheading 6807.90.00, HTSUS, "Articles of asphalt or of similar material * * * Other." At first glance, "articles of asphalt" may appear to encompass the roll roofing and shingles at issue. An "article" may be defined as "a material thing: item, object." *Webster's Third New International Dictionary* 123 (1986) *(Webster's)* (capitalization omitted).[6] The parties have stipulated that the paper felt is "dipped into a tank of hot liquid asphalt" and is subsequently put through a "wet

[6] To determine the proper meaning of these tariff terms, the Court will construe the terms "'in accordance with their common and popular meaning, in the absence of contrary legislative intent.'" *Marubeni Am. Corp. v. United States*, 12 Fed. Cir. (T) ____, ____, 35 F.3d 530, 534 (1994) (quoting *E.M. Chems. v. United States*, 9 Fed. Cir. (T) 33, 37, 920 F.2d 910, 913 (1990) (citations omitted)). "'To assist it in ascertaining the common meaning of a tariff term, the court may rely upon its own understanding of the terms used, and it may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources.'" *Id.* (quoting *Brookside Veneers, Ltd. v. United States*, 6 Fed. Cir. (T) 121, 125, 847 F.2d 786, 789 (citation omitted), *cert. denied*, 488 U.S. 943 (1988)).

looper which draws the asphalt from its surface into the felt to obtain a higher degree of saturation." (Stipulation at ¶ B.11.) The paper felt is also coated with asphalt. *(Id.* at ¶ B.12.)

Plaintiff contends, however, the merchandise is properly classified under subheading 4811.10.00, HTSUS which provides for classification of "asphalted paper and paperboard." The parties agree that the merchandise at issue is "paper-based."[7] The parties' stipulation describes how this base is then:

> transferred to the roofing plant where it is unwound on a dry looper and dipped into a tank of hot liquid asphalt. After leaving the saturator tank, the product enters a wet looper which draws the asphalt from its surface into the felt to obtain a higher degree of saturation.

(Stipulation at ¶ B.11.) The product is then coated with asphalt. *(Id.* at ¶¶ B.12, 14.)

General Rule of Interpretation 3, HTSUS, provides:

> When * * * goods are, *prima facie,* classifiable under two or more headings, classification shall be effected as follows:
>
> (a) The heading which provides the most specific description shall be preferred to headings providing a more general description * * *.

See Medline Indus., Inc. v. United States, No. 94–1455, slip op. at 5 n.1 (Fed. Cir. Aug. 16, 1995) ("Because Heading 6302 of HTSUS provides the most specific provision for the imported [merchandise] and therefore prevails over Heading 6304 and Heading 6307 of HTSUS, we do not address whether the [merchandise] could be properly classified under either of these provisions."). Based on the parties' stipulated description of the merchandise at issue, the Court finds subheading 4811.10.00, HTSUS more specifically describes the merchandise.

Although the parties have not provided a definition of "asphalt*ed* paper," the Court did observe several definitions of "asphalt paper." *The Dictionary of Paper* defines "asphalt papers" as "[a] general term which includes papers saturated, coated, or laminated with asphalt or other bituminous material. See *Asphalt sheathing paper, Duplex asphalt paper, House sheathing paper, Roofing paper, Sheathing paper, Wrap-*

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[7] In the stipulation, the parties refer to the merchandise at issue as "paper-based, asphalt roll roofing" and "paper-based, asphalt shingles." (Stipulation at ¶¶ A.1, 2.) The Court also notes defendant's statement to this Court that "there is no dispute that all of the imported merchandise consists of *paper products* which have been coated and impregnated with asphalt." (Def.'s Br. at 10 (emphasis added) (citing Pl.'s Br. at 4).)

The parties also refer in the stipulation to the paper component of the merchandise as "paper felt." Although the Court could not find a definition of "paper felt," one source defines "felt" as "[a] fibrous, watertight heavy paper of organic or asbestos fibers impregnated with asphalt and used as an overlining or an underlining for roofs. Also known as felt paper." *McGraw-Hill Dictionary of Scientific and Technical Terms* 594 (Sybil P. Parker, ed., 3rd ed. 1984) *(McGraw-Hill).* Another source defined "felt" as "[a] continuous belt generally made of wool but frequently of a combination of two or more of the following fibers: wool, cotton, asbestos, and synthetic fibers." American Paper Institute, Inc., *The Dictionary of Paper* 170 (4th ed. 1980). The same source defines "paper" as follows:

> (1) (General term). The name for all kinds of matted or felted sheets of fiber * * * formed on a fine screen from a water suspension * * *. (2) (Specific term). One of the two broad subdivisions of paper (general term), the other being *Paperboard*[.]

Id. at 296. The Court also notes that, in the stipulation, the parties refer to the first part of the merchandise's formation process as the "Fourdrinier" process. *The Dictionary of Paper* defines a "fourdrinier machine" as the machine "normally employed in the manufacture of all grades of paper and board." *Id.* at 190. Given all of the above, the Court finds part of the merchandise at issue may be considered "paper or paperboard." The Court does not, however, make a finding as to whether the material is either "paper" or "paperboard."

ping paper." The Dictionary of Paper at 23. *The Dictionary of Paper* defines "roofing paper" as:

> A general term used to designate any material used in waterproofing upper decks of buildings. There are several varieties. (1) *Prepared roofing*: felts saturated and coated with asphalt, plain or crushed slate or other grit, embedded in an asphalt-coated surface * * *. (3) *Roofing shingles*: prepared roofing cut into various sizes and styles of shingles.

Id. at 349.[8] Additionally, *Webster's* defines "asphalt paper" as "paper that is impregnated, coated, or laminated with asphalt." *Webster's* at 129; *see also McGraw-Hill* at 112 ("A paper that is coated or impregnated with asphalt."). The parties have stipulated that the merchandise is "coated" with asphalt. *(See* Stipulation at ¶¶ B.12, 14.) Furthermore, from the parties' description of the manufacture of the merchandise at issue, the merchandise also appears to be "impregnated" with asphalt. *(See id.)*[9]

As additional support for classification of the products under subheading 4811.10.00, HTSUS, the Court notes the nature of the advertising materials attached to the stipulation as Exhibit 7. These materials feature photographs of roofs covered with the subject merchandise in various shapes along with brief descriptions of and comments on the products. From these materials, it appears that the asphalt protects against fire and weather,[10] while the paper base acts as a necessary vehicle to create form and enable attachment to roofs. Generally one does not apply only asphalt to sloped roofs, nor does one apply a bare

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[8] Defendant argues "other treatises define the term 'roofing papers' differently." (Def.'s Br. at 20.) In support of this argument, defendant quotes the following definition of "roofing papers":

> This is a class of paper used after saturating with tar or asphalt for cheap roofing and sometimes as an underliner in high grade roofing. An essential characteristic is saturating properties; that is, some strength and a high degree of porosity. Formerly cotton and wool rags were used exclusively for this, but, for a number of years, the supply has been inadequate and has been augmented with specially prepared wood pulp. In the preparation of this pulp, the wood is chipped, soaked in hot water, and ground in an attrition mill under steam pressure. This yields long fiber bundles which produce paper of good saturating properties. However, this wood pulp is generally used in admixture with the aforementioned rags.

Ralph W. Kumler, *Varieties of Paper and Paperboard, in Modern Pulp and Paper Making*, 35, 41 (John B. Calkin, ed., 3rd ed. 1957), *quoted in* Def.'s Br. at 20.

This definition of the term "roofing paper" does not undermine the Court's analysis. First, the key definition upon which the Court relies in this part of the analysis is "asphalt paper," not "roofing paper." The Court finds the definitions of "asphalt paper" described above as sufficiently broad to encompass the merchandise at issue. Simply because one treatise defines a subset of that general term differently from another does not mean the merchandise at issue does not fall into the general category. Additionally, as plaintiff correctly points out in its reply brief, the treatise which defendant cites also states:

> There are hundreds of grades of paper and paperboard of sufficiently distinctive characteristics to be given names. However, it is possible here to describe only the major classes. A complete list with definitions is found in "The Dictionary of Paper[ ]" * * *.

Id. at 35, *quoted in* Pl.'s Reply Br. at 2. Second, treatise definitions are not the only basis for the Court's finding. As described above, the Court finds that subheading 4811.10.00, HTSUS, describes the merchandise at issue more specifically than subheadings 6807.10.00 and 6807.90.00, HTSUS, based on the parties' stipulated description of the merchandise and the manufacture of the merchandise.

[9] According to the parties' stipulation:

> [T]he paper felt is * * * transferred to the roofing plant where it is unwound on a dry looper and dipped into a tank of hot liquid asphalt. After leaving the saturator tank, the product enters a wet looper which draws the asphalt from its surface into the felt to obtain a higher degree of saturation.

(Stipulation at ¶ B.11.) According to *Webster's*, one definition of "impregnate" is "to cause to be filled, imbued, mixed * * * or saturated (as with particles of another substance)." *Webster's* at 1136. *The Dictionary of Paper* defines "impregnation" as "[t]he process of treating a sheet or web of paper or paperboard with a liquid. This may be a molten material such as hot asphalt or wax." *The Dictionary of Paper* at 223.

[10] According to the parties' stipulation, granules used on the surface of roll roofing and shingles which will be exposed to the natural elements "[p]rovide additional fire resistance" and "[p]rotect underlying asphalt from the sun's rays." (Stipulation at ¶ B.15.)

paper product. Instead, one applies roll roofing or shingles, which are composed of both asphalt and paper.[11] This conclusion is further evidenced by an examination of the products themselves.[12]

Finally, the Court notes that under HTSUS GRI 1, "classification shall be determined according to the terms of the headings and any relative section or chapter notes." Chapter Note 1(b) of Chapter 68 specifically excludes from Chapter 68 "[c]oated, impregnated or covered paper of heading 4810 or 4811 (for example, paper coated with mica powder or graphite, bituminized or asphalted paper)." Thus, to be properly classifiable as an "article of asphalt," merchandise cannot be "[c]oated, impregnated or covered paper of heading * * * 4811 (for example * * * asphalted paper)." Based on the all of the above discussion, the Court finds the merchandise at issue is properly classifiable under 4811.10.00, HTSUS.

The Court disagrees with defendant's arguments concerning the merchandise's coating. Defendant argues the central question in this case is "whether the paper or paperboard substrate of the merchandise has been so heavily coated or covered with asphalt and mineral granules that the product is no longer a coated paper." (Def.'s Br. at 10.) Defendant takes the position that, at some point, "a surface treatment loses its character as a treatment of the surface of the material and becomes an article featuring the surfacing material. The substrate, in this case, the paper, becomes subsidiary, even if it still plays an important role in the use of the product." *(Id.* at 13.)

The parties have stipulated that the products are "coated." *(See* Stipulation at ¶¶ B.12, 13.) The Court does not agree, however, with defendant's contention that the products are so coated that subheadings 6807.90.00 and 6807.10.00, HTSUS providing for "articles of asphalt" describe the products more specifically than subheading 4811.10.00, HTSUS providing for "asphalted paper and paperboard." As discussed above, the Court has found that purchasers of the roll roofing and shingles are not purchasing mere asphalt, just as they are not purchasing mere paper products. Instead, customers purchase the subject merchandise "to cover exposed, horizontal," "sloped," "or slightly sloped surfaces of buildings and structures for protection against water damage or damage by other environmental factors." (Stipulation at ¶¶ B.4, 9.) The asphalt and mineral granule components ensure the products protect the surfaces of buildings and structures against "water damage or damage by other environmental factors." The paper component makes the products suitable to "cover exposed, horizontal," "sloped," "or slightly sloped surfaces of buildings and structures." Defendant's

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[11] According to the stipulation, certain surfaces of the merchandise may also be coated or covered with mineral granules, sand, and/or talc. *(See* Stipulation at ¶¶ B.12, 14.)

[12] Additionally, the Court notes the advertising materials do not refer to the merchandise merely as "asphalt," but as "asphalt shingles." *(See* Stipulation, Ex. 7.)

claim that the asphalt component may weigh more than the paper component is not persuasive to this Court.[13]

The Court also disagrees with defendant's reliance on the *Explanatory Notes* of Chapters 68 and 48. Defendant cites the *Explanatory Notes* of Chapter 68, which state Heading 68.07 includes:

> Roofing boards consisting of a substrate (e.g., of paperboard, of web or fabric of glass fibre, of fabric of man-made fibre or jute, or of aluminum foil) completely enveloped in, or covered on both sides by, a layer of asphalt or similar material.

Defendant also points to the *Explanatory Notes* of Chapter 48 and argues the merchandise at issue does not compare to the exemplars listed, "nor are its coatings used for the same kinds of purposes indicated by the *Notes.*" (Def.'s Br. at 16.)

First, the Court notes that although *Explanatory Notes* may be instructive, they are not legally binding. *See, e.g., Marubeni Am.*, 12 Fed. Cir. (T) at ____, 35 F.3d at 535 n.3 ("Explanatory Notes are only instructive and are not dispositive or binding.") (citation omitted). Second, the Court finds the *Explanatory Notes'* references to "roofing board" ambiguous in that the term "roofing board" appears to conflict with the rest of the language in that portion of the *Explanatory Notes*. The language in the *Explanatory Notes* "consisting of a substrate (e.g., of paperboard * * *) completely enveloped in, or covered on both sides by, a layer of asphalt" appears to somewhat describe the products at issue. However, the term "roofing board" is not otherwise defined. The Court believes that, in order to be a "*roofing* board," a product must be stiff and rigid, appropriate to act as the roof itself, not some kind of covering for the roof.[14] This point is highlighted by the definition of "roofing nail" as defined in *McGraw-Hill:* "[a] nail used for attaching paper or shingle to roof boards." *McGraw-Hill* at 1392. One would not hammer or attach "paper or shingle" to the subject merchandise as if it were a roofing board because, as an examination of the merchandise reveals, it is too malleable. Instead, the subject merchandise itself is what would be hammered or attached to a roofing board.[15] Finally, the Court has examined the *Explanatory Notes* of Chapter 48 and finds those *Notes* and the exemplars listed broad enough to encompass the subject merchandise.

Although Customs' decisions enjoy a presumption of correctness, the Court's role in reviewing Customs cases *de novo* is to find the *correct* result. *See Semperit Indus. Prods., Inc. v. United States*, 18 CIT ____, ____, 855 F. Supp. 1292, 1299 (1994). Based on the above analysis, the

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[13] The Court also notes defendant's discussion of *E. Dillingham, Inc. v. United States*, 15 CIT 223 (1991), in its arguments concerning the subject merchandise's "coating." In *E. Dillingham*, the Court addressed the question of whether a treatment imparted by the manufacturer of various kinds of writing and printing paper rendered the papers "coated" under items 254.46 and 254.56, TSUS. *See E. Dillingham*, 15 CIT at 224. In the present case, no question exists that the merchandise is coated. (*See* Stipulation at ¶¶ B.12, 13.)

[14] *Cf. Marubeni Am.*, 12 Fed. Cir. (T) at "____, 35 F.3d at 534 ("'To assist it in ascertaining the common meaning of a tariff term, the court may rely upon its own understanding of the terms used * * *.'") (quoting *Brookside Veneers*, 6 Fed. Cir. (T) at 125, 847 F.2d at 789).

[15] The Court notes the following language from the parties' stipulation: "The imported roll roofing and shingles are used as the exterior cover for a roof." (Stipulation at ¶ B.18.)

Court finds plaintiff has overcome the statutory presumption of correctness and is entitled to judgment as a matter of law.

CONCLUSION

After considering all of plaintiff's and defendant's arguments, the Court finds plaintiff has overcome the presumption of correctness attached to Customs' classification of the subject merchandise under subheadings 6807.10.00 and 6807.90.00, HTSUS, and has demonstrated the merchandise is properly classifiable under subheading 4811.10.00, HTSUS. The Court will enter judgment for plaintiff.

(Slip Op. 95–162)

NIPPON PILLOW BLOCK SALES CO., LTD. AND FYH BEARING UNITS USA, INC., PLAINTIFFS, AND EMERSON POWER TRANSMISSION CORP., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., AND FEDERAL-MOGUL CORP, DEFENDANT-INTERVENORS

Court No. 92–07–00455

Plaintiffs move pursuant to Rule 56.2 of the Rules of this Court for judgment on the agency record. Plaintiffs specifically contest the Department of Commerce, International Trade Administration's ("Commerce") determination (1) to use annual weighted-average foreign market values ("FMVs"); and (2) to use total best information available ("BIA") to compute plaintiffs' dumping margin.

Held: Plaintiffs' motion for judgment on the agency record is denied and this case is dismissed.

[Plaintiffs' motion denied and case dismissed.]

(Dated September 22, 1995)

Michael Brown for plaintiffs Nippon Pillow Block Sales Co., Ltd. and FYH Bearing Units USA, Inc.

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Stewart and Stewart (Terence P. Stewart, James R. Cannon, Jr., John M. Breen and *Patrick J. McDonough)* for defendant-intervenor The Torrington Company.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, Larry Hampel and *Joseph A. Perna, V)* for defendant-intervenor Federal-Mogul Corporation.

OPINION

TSOUCALAS, *Judge:* Plaintiffs, Nippon Pillow Block Sales Company, Ltd., and FYH Bearing Units USA, Inc. (collectively "Nippon"), commenced this action challenging certain aspects of the United States Department of Commerce, International Trade Administration's

("Commerce") final results of its second administrative review of certain antifriction bearings and parts thereof from Japan. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews ("Final Results")*, 57 Fed. Reg. 28,360 (June 24, 1992).

BACKGROUND

On June 28, 1991, Commerce initiated an administrative review of the antidumping duty order on ball bearings, cylindrical roller bearings, spherical plain bearings, and parts thereof from Japan, for the period of May 1, 1990 to April 30, 1991. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Initiation of Antidumping Administrative Reviews*, 56 Fed. Reg. 29,618 (1991).

On March 31, 1992, Commerce published the preliminary determination of its second administrative reviews, for the period of May 1, 1990 to April 30, 1991. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 57 Fed. Reg. 10,868 (1992).

On June 24, 1992, Commerce published the final results of its second administrative reviews. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews*, 57 Fed. Reg. 28,360 (1992).

Plaintiffs move pursuant to Rule 56.2 of the Rules of this Court for judgment on the agency record, alleging the following determinations by Commerce were unsupported by substantial evidence on the agency record and not in accordance with law: (1) to use annual weighted-average foreign market values ("FMVs"); and (2) to use total best information available ("BIA") to compute plaintiffs' dumping margin.

DISCUSSION

The Court's jurisdiction in this action is derived from 19 U.S.C. § 1516a(a)(2) (1988) and 28 U.S.C. § 1581(c)(1988).

The Court must uphold Commerce's final determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with the law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on the grounds of a differing interpretation of the record." *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed. Cir. 1990).

1. *Use of annual weighted-average FMVs:*

Plaintiffs contend that Commerce failed to meet its statutory burden, pursuant to the Tariff Act of 1930 (the "Act"), to demonstrate that annual weighted-average FMVs are representative of the prices of home market sales made at the same time as United States sales. *Plaintiffs' Memorandum in Support of Motion for Judgment Upon the Agency Record ("Plaintiffs' Brief")* at 7–8. Specifically, plaintiffs claim that Commerce's actions were inconsistent with sections 773(a) and 777A of the Act, codified at 19 U.S.C. § 1677b(a) (1988) and 19 U.S.C. § 1677f–1 (1988), respectively. *Plaintiffs' Brief* at 7–11. According to plaintiffs, 19 U.S.C. § 1677f–1 permits Commerce to use averages only if they are representative of the underlying transaction. *Id.* at 8. Plaintiffs also emphasize the language of 19 U.S.C. § 1677b(a) which defines FMV as follows: "The foreign market value of imported merchandise shall be the price, at the time such merchandise is first sold within the United States * * *." Plaintiffs contend that the following reasoning provided by Commerce for its decision to use annual weighted-averages was insufficient to meet the statutory requirements:

> Section 777A of the Tariff Act requires the Department to ensure that samples and averages shall be representative of the transactions under review. Therefore, before adopting the use of an annual weighted-average FMV, we conducted two studies on prices to ensure that the transactions, and thus the results produced, would be representative. First, we compared the monthly weighted-average price to the annual weighted-average price. We found that the annual weighted-average price for more than 90 percent of the products sold was within 10 percent of the monthly weighted-average price. Second, we tested whether home market prices of the subject merchandise consistently rose or fell during the period of review (POR). We found that no significant correlation existed between price and time. That is, prices did not consistently rise or fall so as to make annual weighted-average prices unrepresentative of home market prices.

Final Results, 57 Fed. Reg. at 28,368.

Plaintiffs maintain that the first study described by Commerce is flawed because it does not consider up to 10% of monthly prices which may vary by more than 10%. *Plaintiffs' Brief* at 9–11. Plaintiffs allege that Commerce's methodology may result in annual weighted-averages that vary vastly from the monthly weighted-averages of home market sales contemporaneous to United States sales. *Id.* at 10–11.

In addition, plaintiffs contend that the second test used by Commerce, the Pearson correlation coefficient, does not indicate that the annual weighted-average FMVs are representative of any particular prices during the period of review. *Id.* at 12–13. Plaintiffs explain that the Pearson correlation coefficient only measures whether there is a consistent increase or decrease in price over time. *Id.* Plaintiffs conclude that the fact that the prices fluctuate, as indicated by the lack of a correlation, does not mean that the annual average prices are representative of the

prices of home market sales contemporaneous with United States sales. *Id.* at 14.

In rebuttal, Commerce argues that pursuant to 19 U.S.C. § 1677f–1(a), averaging techniques are appropriate whenever a significant volume of sales is involved. *Defendant's Memorandum in Opposition to Plaintiffs' Motions for Judgment on the Agency Record ("Defendant's Brief")* at 27–28. Commerce also asserts that its actions were consistent with the Act since it conducted two studies before deciding to use annual weighted-averages. *Defendant's Brief* at 28–29. Commerce argues that plaintiffs' contentions are based on hypothetical numbers that fail to demonstrate that the use of annual weighted-average FMVs would actually create higher dumping margins. *Id.* at 29.

Commerce further responds that the Pearson correlation coefficient guaranteed that there would be no vast difference in prices of merchandise sold during different times of the period of review. *Id.* According to Commerce, the two tests used in tandem were sufficient to ensure that the use of annual weighted-averages would not cause a systematic distortion of dumping margins. *Id.* at 29–30.

The Torrington Company ("Torrington") and Federal-Mogul Corporation ("Federal-Mogul") essentially support Commerce's decision to use annual weighted-average FMVs. *The Torrington Company's Response to Plaintiffs' Motion for Judgment on the Agency Record ("Torrington's Brief")* at 14–20; *Opposition of Federal-Mogul Corporation, Defendant-Intervenor, to Plaintiffs' Motion for Judgment Upon the Agency Record ("Federal-Mogul's Brief")* at 13–16.

According to 19 U.S.C. § 1677f–1:

> For the purpose of determining United States price or foreign market value under sections 1677a and 1677b of this title, and for purposes of carrying out annual reviews under section 1675 of this title, the administering authority may—
>
> (1) use averaging or generally recognized sampling techniques whenever a significant volume of sales is involved or a significant number of adjustments to prices is required, and
>
> (2) decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise.
>
> **(b) Selection of samples and averages**
>
> *The authority to select appropriate samples and averages shall rest exclusively with the administering authority; but such samples and averages shall be representative of the transactions under investigation.*

(Emphasis added). The language of the statute clearly grants Commerce discretion to decide when to average prices as long as they are representative of the transactions under investigation. As indicated in the Final Results, Commerce conducted two studies to determine whether the averages were representative of the underlying transactions. 57 Fed. Reg. at 28,368. In *Koyo Seiko Co. v. United States*, 17 CIT 474, 476, 840 F. Supp. 136, 138, *aff'd*, 20 F.3d 1156 (Fed. Cir. 1994), this Court found that Commerce behaved reasonably when it used annual weighted-averages

based on studies that are identical to the ones in the case at bar. In *Koyo Seiko*, this Court found that Commerce's decision to use annual weighted-averages based on the two tests described by Commerce was "reasonable and representative." *Koyo Seiko*, 17 CIT at 476, 840 F. Supp. at 139. In light of the decision in *Koyo Seiko*, this Court finds that Commerce's determination to use annual weighted-averages in the present case was within Commerce's discretion pursuant to 19 U.S.C. § 1677f–1 and in accordance with law.

2. *Use of best information available:*

In this review, Commerce used as BIA the "all others" rate from the less-than-fair-value investigation that was used in the first administrative review. *Final Results*, 57 Fed. Reg. at 28,379. Plaintiffs contend that Commerce should not have resorted to use of BIA since plaintiffs provided Commerce with all information pertaining to home market sales contemporaneous to United States sales. *Plaintiffs' Brief* at 15. According to plaintiffs, FMVs should have been calculated on the basis of the monthly averages of contemporaneous sales. *Id.* Plaintiffs maintain that since they reported contemporaneous sales information, the use of BIA was inappropriate.

Plaintiffs further assert that even if Commerce was justified in using BIA, it should not have used total BIA. *Id.* at 15–17. Plaintiffs contend that Commerce should have calculated the antidumping margins by using the contemporaneous monthly data submitted by plaintiffs and then adjusting these margins by the maximum amount by which the monthly averages were permitted to vary from the annual averages. *Id.* at 16. Plaintiffs conclude that Commerce should have used, as BIA, the margins calculated from the contemporaneous monthly data multiplied by 110%. *Id.*

Commerce contends that it properly resorted to use of the "all others" rate from the first administrative review as BIA. *Defendant's Brief* at 48. Commerce rejects plaintiffs' proposed methodology as merely rewarding plaintiffs for their failure to report requested information. *Id.* According to Commerce, the determination of what information is necessary for an administrative review is to be made by Commerce, not the respondents. *Id.* at 48–49.

Commerce further responds that plaintiffs' refusal to report the requested information prevented Commerce from determining whether annual weighted-averages or monthly weighted-averages would ultimately be used in calculating FMVs. *Id.* at 49. In addition, Commerce contends that it could not determine whether plaintiffs' home market sales were made at below the cost of production. *Id.* Commerce concludes that, in light of the above, it should not be expected to rely upon only 20% of the requested home market sales data in order to calculate antidumping margins. *Id.*

Torrington and Federal-Mogul essentially support Commerce's decision to use total BIA to compute the dumping margin. *Torrington's Brief* at 27–29; *Federal-Mogul's Brief* at 16–17.

Section 1677e(c) of Title 19, United States Code (1988), states that Commerce "shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available." In addition, Commerce's regulations instruct the Secretary to use BIA whenever Commerce:

> (1) Does not receive a complete, accurate, and timely response to the Secretary's request for factual information; or
> (2) Is unable to verify, within the time specified, the accuracy and completeness of the factual information submitted.

19 C.F.R. § 353.37(a) (1992).

Since this Court has already determined that Commerce's decision to use annual weighted-averages is in accordance with law, plaintiffs' assertion that they provided Commerce with all necessary information pertaining to home market sales is without merit. Plaintiffs concede that they reported home market sales for only those sample months which corresponded to the months in which they reported United States sales or, if there were no corresponding sales in a particular month, for either the prior sample month or the immediately following sample month. *Plaintiffs' Brief* at 6. This information was clearly insufficient for computing annual weighted-average FMVs. Plaintiffs' failure to submit "complete" information justified Commerce's use of BIA. Thus, Commerce's decision to resort to BIA was supported by substantial evidence and in accordance with law.

In addition, plaintiffs' alternative argument is unpersuasive. Commerce stated its reasons for resorting to total BIA as follows:

> We have determined that total BIA will be used for NPBS in the final results of review. This decision is based on the fact that NPBS did not report requested HM sales information in a timely manner and in the form required. NPBS failed to report over 80 percent of its home market sales in its response to the Department's questionnaire. A home market database containing only 20 percent of required sales is not an adequate basis for analysis and calculation of foreign market value.

Final Results, 57 fed. Reg. at 28,380.

The Court finds that Commerce's explanation is valid. This Court, in a related case, has already determined that plaintiffs failed to provide Commerce with all of the information requested in the questionnaire supplied by Commerce. *Emerson Power Transmission Corp. v. United States*, 19 CIT ___, ___, Slip Op. 95–155 at 9–11 (Sept. 1, 1995). *See also Questionnaire*, PR Document No. 26 at 12–13. In light of plaintiffs' failure to submit all of the requested information, the contention that Commerce should have used the reported sales and adjusted them accordingly to compute the dumping margin is inconsistent with the purpose of the BIA scheme. In *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1560 (1984), the Court of Appeals for the Federal Circuit ("CAFC") referred to BIA as "an investigative tool, which that agency

may wield as an informal club over recalcitrant parties or persons whose failure to cooperate may work against their best interest."

Furthermore, this Court has recognized that Commerce has broad discretion in determining what information to use once it establishes that the application of BIA is appropriate. *See Emerson*, 19 CIT at ____, Slip Op. 95–155 at 19 (finding Commerce's use of the "all others" rate as BIA appropriate as applied to Nippon). In *Allied-Signal Aerospace Co. v. United States*, 996 F.2d 1185, 1191 (Fed. Cir. 1993), the CAFC noted that "because Congress has 'expressly left a gap for the agency to fill' in determining what constitutes the best information available, the ITA's construction of the statute must be accorded considerable deference" (quoting *Chevron U.S.A., Inc. v. United States*, 467 U.S. 837, 843–44 (1984)). Thus, it is well-established that Commerce's interpretation of what data should be used as BIA deserves considerable deference.

Commerce has interpreted BIA as a rule of adverse inference which establishes a presumption that the highest prior margins are the best information available. *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190–91 (Fed. Cir. 1990). This presumption may be rebutted by the respondent with evidence showing the actual margin to be less. In the present case, Commerce used as BIA the "all others" rate from the first administrative review. *Final Results*, 57 Fed. Reg. at 28,379. This Court has already determined that Commerce's choice was proper. *See Emerson*, 19 CIT at ____, Slip Op. 95–155 at 17–20. As in *Emerson*, plaintiffs fail to present evidence showing the actual margin to be less than the margin determined on the basis of BIA. Instead, plaintiffs offer calculations based upon only 20% of the necessary information. Moreover, due to plaintiffs' failure to provide complete information, Commerce was unable to determine whether it would have ultimately used annual weighted-averages to compute plaintiffs' dumping margin. *See Federal-Mogul's Brief* at 12. Thus, there is insufficient evidence to determine whether the actual margin would have been less than the margin computed using the "all others" rate.

In addition, Commerce is correct in its assertion that use of plaintiffs' incomplete questionnaire response would only reward it for failing to report requested information. In *Persico Pizzamiglio, S.A. v. United States*, 18 CIT ____, ____, Slip Op. 94–61 at 17–19 (Apr. 14, 1994), this court rejected the argument that Commerce should have used some of the verified information submitted by plaintiff instead of relying on unverified information as BIA. The court reasoned as follows:

> If the court were to accept Persico's argument, such result might encourage respondents to analyze the information Commerce would employ as BIA should that agency ignore a questionnaire response for being unresponsive or incomplete. Presumably, the respondent would then selectively disclose only that information which would decrease a dumping margin calculated from BIA * * *. In this way, it would be in respondents' best interest to only partially respond to Commerce's inquiry * * *. By allowing Commerce to reject a submission *in toto*, the court encourages full disclosure by

> the respondent, because only full disclosure will lead to a dumping margin lower than that established by employing BIA.

Persico Pizzamiglio, 18 CIT at ____, Slip Op. 94–61 at 18–19. This reasoning applies to the case at bar as well. If Commerce were required to use the small portion of the requested information that Nippon submitted, there would be no incentive for Nippon to provide Commerce with complete information since the submission of partial information would result in a decreased dumping margin.

In sum, this Court finds that Commerce's decision to use total BIA is supported by substantial evidence and in accordance with law.

CONCLUSION

In accordance with the foregoing opinion, this Court, after due deliberation and a review of all papers in this case, finds that Commerce's actions were in accordance with law and supported by substantial evidence. For the reasons stated above, the Final Results are affirmed and plaintiffs' motion is denied in all respects. This case is hereby dismissed.

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